In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1126

Supreme Court, U. S.
FILED
FEB 9 1976
MICHAEL RODAK, JR., CLERK

TRANS WORLD AIRLINES, INC.,
Petitioner,

vs.

LARRY G. HARDISON, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT 142 and INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, LOCAL 1650,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

DICK H. WOODS
GEORGE E. FELDMILLER
STINSON, MAG, THOMSON, MCEVERS & FIZZELL
2100 TenMain Center
Kansas City, Missouri 64105
(816) 842-8600
Attorneys for Trans World Airlines, Inc.

Of Counsel:

RAYMOND R. FLETCHER, JR.
Vice President and General Counsel

JAMES J. MOLLENKAMP
Assistant General Counsel
Trans World Airlines, Inc.
Post Office Box 20126
Kansas City International Airport
Kansas City, Missouri 64195
(816) 891-7500

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, 421-3030

INDEX

Opinions Below 2

Jurisdiction 2

Questions Presented 2

Constitutional Provision, Statute and Guideline Involved 3

Statement Under Rule 33(2)(b) 5

Statement of the Case—

A. Preliminary Statement 5

B. Factual Background 6

C. Proceedings Below 12

Reasons for Granting the Writ—

I. The Interpretation of the Statute and Guideline by the Court of Appeals Results in Innumerable Recurrent Nationwide Problems in the Administration of Uniform Work Rules in Collective Bargaining Agreements 14

II. The Statute and Guideline Violate the Establishment Clause 17

III. The Decision of the Court of Appeals Conflicts With the Decisions of Other Courts of Appeal As to the Determination of Whether a Reasonable Accommodation Without Undue Hardship Is Possible 22

IV. The Court of Appeals Created a De Novo Review at the Appellate Level in Cases Pertaining to Religious Discrimination in Derogation of Rule 52(a) of the Federal Rules of Civil Procedure Thereby Requiring the Exercise of This Court's Supervisory Powers to Avoid Recurrent Problems 25

Conclusion 29

Appendix A—Memorandum and Order, United States District Court, Western District of Missouri A1

Appendix B—Opinion and Order, United States Court of Appeals, Eighth Circuit A29

Appendix C—EEOC Findings and Decision A52

Appendix D—Excerpts from Trial Transcript A62

Authorities Cited

Cases

Committee for Public Education and Religious Education and Religious Liberty v. *Nyquist*, 413 U.S. 757 (1973) 18, 20

Cook v. *Mountain States Telephone and Telegraph Company*, 397 F. Supp. 1217 (D. Ariz. 1975) 6

Cummins v. *Parker Seal Company*, 516 F.2d 544 (6th Cir. 1975), petition for certiorari filed 44 L.W. 3207 (U.S. Sept. 25, 1975) (No. 75-478) 16, 18, 21, 25

Dawson v. *Mizell*, 325 F. Supp. 511 (E.D. Va. 1971) 24

Dewey v. *Reynolds Metals Co.*, 429 F.2d 324 (6th Cir. 1970), *aff'd* by an equally divided Court, 402 U.S. 689 (1971) 17, 25

Dixon v. *Omaha Public Power District*, 385 F. Supp. 1382 (D. Neb. 1974) 6

Draper v. *U. S. Pipe & Foundry Co.*, 44 U.S.L.W. 2295 (6th Cir., December 12, 1975), 11 F.E.P. 1106 (6th Cir. 1975) 25, 26

Everson v. *Board of Education*, 330 U.S. 1 (1947) 20

Gillette v. *United States*, 401 U.S. 437 (1971) 20, 21

Griggs v. *Duke Power Company*, 401 U.S. 424 (1971) 21

Hardison v. *Trans World Airlines, Inc.*, ... F.2d ..... (8th Cir. 1975), 44 U.S.L.W. 2295 (8th Cir., December 16, 1975) 2, 25

Johnson v. *U. S. Postal Service*, 364 F. Supp. 37, *aff'd* 497 F.2d 128 (5th Cir. 1974) 23, 24

McGowan v. *Maryland*, 366 U.S. 420 (1961) 21

Otten v. *Baltimore & O.R.R.*, 205 F.2d 58 (2d Cir. 1953) 22

Reid v. *Memphis Publishing Company*, 468 F.2d 346 (6th Cir. 1972) 25

Reid v. *Memphis Publishing Co.*, 521 F.2d 512 (6th Cir. 1975) 18, 23, 25

Riley v. *Bendix Corporation*, 464 F.2d 1113 (5th Cir. 1972) 25

Roberts v. *Hermitage Cotton Mills*, 8 F.E.P. 315 (D.C. S.C. 1973), *aff'd* 8 F.E.P. 319 (4th Cir. 1974) 23, 24, 25

Torasco v. *Watkins*, 367 U.S. 488 (1961) 20

United States v. *City of Albuquerque*, 9 EPD 10,182 (D. N. Mex. 1975) 6

Yott v. *North American Rockwell*, 501 F.2d 398 (9th Cir. 1974) 16, 21

Young v. *Southwestern Savings & Loan Association*, 509 F.2d 140 (5th Cir. 1975) 6, 25

Statutes

28 U.S.C. § 2403 5

28 U.S.C. § 1254(1) 2

42 U.S.C. § 2000e-5(f) 2

National Labor Relations Act (29 U.S.C. § 151, *et seq.*) 6, 14

Railway Labor Act (45 U.S.C. § 151, *et seq.*) 14

Section 701(j) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(j) (1974) 3, 5

Section 703(a)(1) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (1974) 4, 5
Section 703(h) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(h) (1974) 4, 14, 21-22

REGULATIONS AND RULES

Rule 52(a) of the Federal Rules of Civil Procedure 3, 25, 28
29 CFR § 1605.1 (1974) 4

LEGISLATIVE MATERIAL CITED

118 Cong. Rec. 705 (1972) 19
110 Cong. Rec. 1528-29 (1964) 19

OTHER AUTHORITIES

Edwards and Kaplan, *Religious Discrimination and the Role of Arbitration Under Title VII*, 69 Mich L. Rev. 599 (1971) 12, 18, 20
44 Fordham L. Review 442 (1975) 18, 20, 21
Matthew 27:24 13
118 Mich. Law. Quad. Notes No. 2, p. 17, 1974 18

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. .....

TRANS WORLD AIRLINES, INC.,
Petitioner,
vs.
LARRY G. HARDISON, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT 142 and INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, LOCAL 1650,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner, Trans World Airlines, Inc. ("TWA") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on December 16, 1975.[1]

1. TWA was a co-defendant below with the International Association of Machinists and Aerospace Workers, International Association of Machinists and Aerospace Workers, District 142 and International Association of Machinists and Aerospace Workers, Local 1650. The district court judgment in favor of the unions was upheld by the court of appeals because of Hardison's failure to process an appeal against them (B. p. A46). *Amicus Curiae* briefs were filed in the court of appeals by the Equal Employment Opportunity Commission and the National Jewish Commission on Law and Public Affairs.

OPINIONS BELOW

The opinion of the court of appeals (B. p. A29)[2] is unreported except in 44 U.S.L.W. 2295 (8th Cir., December 16, 1975). The judgment and opinion of the district court (A. p. A1) is reported at 375 F. Supp. 877 (W.D. Mo. 1974). The findings and decision of the Equal Employment Opportunity Commission (EEOC) is unreported (C. p. A52).

JURISDICTION

The judgment of the court of appeals reversing, in part, the judgment of the district court was entered December 16, 1975. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). The jurisdiction of the district court was based upon 42 U.S.C. § 2000e-5(f) (Tr. App. 229-230).

QUESTIONS PRESENTED

(1) Must an employer under the 1964 Civil Rights Act and the establishment clause of the First Amendment, accord preferential treatment to accommodate an employee's religious practices by (a) depriving, without union consent, more senior employees (who may or may not have any religious beliefs) of their seniority rights under a bona fide collective bargaining agreement that did not lock in any past discrimination and which was completely nondiscriminatory against any religion; or (b) financing

2. Reference to "Tr. App. 66" is the transcript appendix which was filed in the circuit court, as well as filed and certified in this Court. References to "A. p. A.....", "B. p. A.....", "C. p. A.....", and "D. p. A....." are to the appendixes annexed to this petition.

an employee's religious observances through payment of overtime wages to a replacement or depriving other work areas of coverage?

(2) Whether the court of appeals improperly precluded an employer having a large labor force from demonstrating an inability to reasonably accommodate without undue hardship the deviate religious practices of its employees?

(3) Whether irreconcilable conflicts between the decisions of different circuits regarding what constitutes reasonable accommodation without undue hardship should be resolved by this Court?

(4) Whether the court of appeals failed to follow Rule 52(a) of the Federal Rules of Civil Procedure in holding the district court's findings clearly erroneous and in effect trying the matter *de novo*?

CONSTITUTIONAL PROVISION, STATUTE, AND GUIDELINE INVOLVED

The establishment clause of the First Amendment provides: "Congress shall make no law respecting an establishment of religion. . . ."

Section 701(j) of the Civil Rights Act of 1964, as amended, provides:

> The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business. 42 U.S.C. § 2000e(j) (1974).

Section 703(a)(1) of the Civil Rights Act of 1964, as amended, provides in pertinent part:

> It shall be an unlawful employment practice for an employer . . . to . . . discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's . . . religion. . . . 42 U.S.C. § 2000e-2(a)(1) (1974).

Section 703 (h) of the Civil Rights Act of 1964, as amended, provides in pertinent part:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply * * * different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system * * * provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex or national origin. * * *" 42 U.S.C. § 2000e-2(h) (1974).

Guideline 1605.1 of the United States Equal Employment Opportunity Commission provides in pertinent part:

> [S]ection 703(a)(1) of the Civil Rights Act of 1964, includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business.
>
> * * *
>
> [T]he employer has the burden of proving that an undue hardship renders the required accommodations to the religious needs of the employee unreasonable. 29 CFR § 1605.1 (1975).

STATEMENT UNDER RULE 33(2)(b)

This proceeding draws into question the constitutionality of Section 701(j) of the Civil Rights Act of 1964, 78 Stat. 255, as amended by Section 2(7) of the Equal Employment Opportunity Act of 1972, 86 Stat. 103, 42 U.S.C. § 2000e(j) [1974] and Section 703(a)(1) of that Act, 78 Stat. 255, 42 U.S.C. § 2000e-2(a)(1) [1974], Acts of Congress affecting the public interest. Since neither the United States nor any agency, officer or employee thereof is a party, it is noted that 28 U.S.C. § 2403 may be applicable.

The United States Court of Appeals for the Eighth Circuit, pursuant to 28 U.S.C. § 2403, on November 21, 1974 certified to the Attorney General the fact that the constitutionality of such sections of the Civil Rights Act of 1964, as amended, might be drawn into question.

STATEMENT OF THE CASE

A. Preliminary Statement. This case presents questions of exceptional importance regarding statutory and administrative requirements of employers to reasonably accommodate the religious needs of employees and the constitutionality of those requirements under the establishment clause of the First Amendment.

The questions presented require resolution in the interest of uniform administration of significant legislation and the determination of constitutional questions of substantial import.[3]

---

3. Substantial savings of judicial and private resources can be achieved by review of this case because the decision of the district court had gained wide acceptance prior to the reversal

(Continued on following page)

B. Factual Background. Larry G. Hardison, the plaintiff below, was hired by TWA on June 5, 1967. When hired, Hardison indicated he was willing to work shifts, including weekends. In late September or early October, 1968, he adopted the religion of the Worldwide Church of God which observes its Sabbath from Friday at sunset until Saturday at sunset (Tr. App. 40 and 259).

During the period of time Hardison was employed by TWA, he was a member of the International Association of Machinists and Aerospace Workers and his employment relationship was governed by a collective bargaining agreement made pursuant to the Railway Labor Act, 45 U.S.C. § 151 *et seq.* The agreement contained a seniority provision that controlled the work day assignment for Harison and 15,000 other covered employees (Tr. App. 40).[4]

The district court found that, "The seniority system was not designed with the intention to discriminate against religion nor did it act to lock members of any religion into a pattern wherein their freedom to exercise their religion was limited" and that ". . . it was coincidental

---

Footnote Continued—

by the court of appeals. The opinion by the district court (Oliver, J.) has been cited with approval and followed in *Dixon* v. *Omaha Public Power District*, 385 F. Supp. 1382 (D. Neb. 1974); *United States* v. *City of Albuquerque*, 9 EPD 10,182 (D. N. Mex. 1975); *Young* v. *Southwestern Savings & Loan Association*, 509 F.2d 140 (5th Cir. 1975) and *Cook* v. *Mountain States Telephone and Telegraph Company*, 397 F. Supp. 1217 (D. Ariz. 1975).

4. The pertinent seniority provision provided:

> The principle of seniority shall apply in the application of this Agreement in all reductions or increases of force, preference of shift assignments, vacation period selection, in bidding for vacancies on new jobs, and in all promotions, demotions, or transfers involving classifications covered by this Agreement (Tr. App. 412).

The union steward maintains the seniority list and fills job vacancies by reference to that list (Tr. App. 371).

that in plaintiff's case the seniority system acted to compound his problems exercising his relgion." (Tr. App. 238 and 59 and A. pp. A10-A11).

In April, 1968, Hardison was working in TWA's Stores Department on the twilight shift, 3:30 to 11:00 p.m. (Tr. App. 258-259). About that time he began studying the teachings of the Worldwide Church of God. On April 25, 1968, Hardison wrote Everett Kussman, TWA's Manager of Stores Systems, asking for Friday sunset to Saturday sunset off (Tr. App. 380). In response to that request, Kussman (1) agreed to the union seeking to swap days off; (2) to excuse time off on religious holidays if Hardison agreed to work on "Christian" holidays, if requested; and (3) to attempt to find Hardison another job (Tr. App. 45-56 and 398). On May 7, 1968, Burns Prater, a TWA supervisor, wrote Kussman, "I haven't made any headway. His time off and day off requirements are too tough to handle. I understand that no one would swap days off with him" (Tr. App. 46).

In the latter part of September, 1968, Hardison requested and received a conference with Kussman. James Tinder, union steward, was also present (Tr. App. 46). At this meeting, Hardison's requirement for time off on religious holidays was discussed and Kussman agreed that the steward should seek to swap days off, to excuse time off on specific holidays if Hardison agreed to work on regular holidays, and to attempt to find Hardison another job (Tr. App. 239, 272-273 and 373-374).

On October 4, 1968, Hardison again wrote a letter to Kussman informing him that he had worked out his day off requirement by transfer to the 11:00 p.m. to 7:00 a.m. shift, which enabled him to observe his Sabbath,

and renewing his request for specific religious holidays off (Tr. App. 381). In response, Kussman reiterated his offer to permit time off on Hardison's religious holidays whenever possible and requested a list of those holidays (Tr. App. 382). The union had no objection to TWA allowing Hardison such an excuse for his religious holidays (Tr. App. 59). October 20, 1968, Hardison supplied such a list and expressed his gratitude for Kussman's "understanding and cooperation" (Tr. App. 383).

On December 2, 1968, Hardison voluntarily transferred, to suit his own convenience, from Building 1, where he had sufficient seniority to maintain a shift in which he could observe his Sabbath, to Building 2, where he was near the bottom of the seniority list. Hardison knew, being junior in the new department, that he might receive some assignments on his Sabbath.[5] March 7, 1969, the man immediately below Hardison in seniority in Building 2 went on a two week vacation, which resulted in Hardison's initial Saturday work (Tr. App. 41-42 and 260-261 and D. p. A62.[6]

Due to the events described above, Kussman anticipated difficulties and arranged a meeting on March 6,

---

5. Hardison testified he knew, in general, that more senior employees preferred not to work weekends (Tr. App. 369) and if he had been allowed to bump out of seniority, either to transfer shifts or bid shifts, it would necessarily mean that an individual who did not share his religious beliefs would be deprived of rights under the collective bargaining agreement (Tr. App. 277, 288).

6. Hardison's problem of not having his Sabbath off in the new building was a permanent problem and not a temporary one. However, the problem became acute by virtue of vacation scheduling. Hardison missed work on March 8 and 15, 1969, because of a vacation of the junior man. He also missed work on March 22, 1969. Thereafter, he transferred to a different shift from which he left work at sunset on Friday, March 29, 1969. The chairman of the Union Grievance Committee testified that Hardison had ". . . a permanent problem, not a temporary one" (Tr. App. 355).

1969, with Hardison and the union steward, Tinder (Tr. App. 268). At that meeting, Kussman offered to accommodate Hardison's religious observance by agreeing to any trade of shifts or change of sections that Hardison and the union could work out (Tr. App. 261-264, 268-269, 300-301, 371-372, 374-376). Tinder, the union steward, was amenable to working out Hardison's problem on any of the above bases, subject, however, to the seniority provisions of the collective bargaining agreement. On that date, there were no jobs open for bid nor did Hardison have sufficient seniority to bid on any other job (Tr. App. 284). Any shift or change was impossible within the seniority framework and, despite the consent of TWA, the union was not willing to violate the seniority provisions set out in the contract in order to make changes for Hardison (Tr. App. 269, 302 and 354). The seniority provisions, therefore, precluded the possibility of Hardison's changing his job (Tr. App. 240). TWA was unwilling to permit Hardison to work only four days a week because that would deprive it of work coverage on a day that it needed a man to work (Tr. App. 302 and 322-323).

Hardison was the only person in his job on his shift during the weekends (Tr. App. 267 and 299). To leave that position empty would have impaired the supplying of parts for essential airline operations (Tr. App. 299-300 and 325-326). Had TWA simply granted Hardison days off on his Sabbath, it would have been short of help in the Stores Department of its overhaul facilities at Kansas City International Airport (KCI) (Tr. App. 298, 302). That department is responsible for housing, retaining, and making available parts for use by TWA at its overhaul base and throughout its system (Tr. App. 40-41, 290, 325-326). The department is also obligated to supply airline needs in the event of an emergency (Tr. App. 290).

It operates on a twenty-four-hour-per-day, seven-days-a-week basis (Tr. App. 290). The work in that area would have been greatly imperiled (Tr. App. 319) and flights could be delayed (Tr. App. 336-338) if the department is not properly manned. To fill Hardison's position with supervisory personnel or someone from another area would deprive that area of its regular manpower (Tr. App. 299-300, 318, 326-327, 338). To bring in a man not working on that day or to possibly hold a man over from another shift would force TWA to pay overtime wages (Tr. App. 300, 318-319). Moreover, under the collective bargaining agreement the overtime, in such circumstances, could not be compulsory and TWA might not be able to get it (Tr. App. 302).

Had TWA forced another employee to trade shifts or jobs with plaintiff, such action would have violated the seniority provisions of the labor management contract and TWA would have been subjected to personnel problems and grievances (Tr. App. 276-277, 288, 327, 330-332, 336). TWA did, however, authorize the union steward to contact employees concerning a swap and it was his function to do so (Tr. App. 293, 301, 302, 313). The union, however, would not violate the seniority provision (Tr. App. 354). The employees represented by the unions involved in this case take seniority as a very serious and important contractual right (Tr. App. 339) and uniform application of the seniority principles is important (Tr. App. 330). Indeed, Hardison testified that some union members regard their seniority rights as preciously as he regarded his religious beliefs (Tr. App. 379).

TWA had reduced, or minimal, work forces on the weekends (Tr. App. 294-295) and employees with high seniority generally preferred not to work weekends (Tr. App. 369). The Saturday work force on Hardison's location

consisted of some 38 to 40 people but, as noted above, Hardison was the only person performing his job. Normally, some 200 employees could perform plaintiff's job but they were not available at the mere whim of TWA because of the reduced weekend staff and seniority rights. In regard to the difficulties of merely switching employees from shift to shift or job to job, Kussman testified that, since TWA did not have complete versatility due to the union agreement or security provision, ". . . it isn't just like saying from here to here." Mr. Kussman had the opinion that, even assuming no such restriction, as the number of instances that require exceptions and special provisions increase, the difficulty of working out such arrangements would also increase (Tr. App. 316).

Hardison was absent from his scheduled work on March 8, 15 and 22, 1969. Prior to a scheduled discharge hearing, Hardison changed to a twilight shift, which permitted him a day off on Saturdays. The local union believed, at that time, that its problems were solved (Tr. App. 347). However, on Friday, March 28, 1969, Hardison quit work at sundown. It was immediately apparent to the union that it could not argue that Hardison should not be discharged on the ground that his conflict had been resolved (Tr. App. 347). According to the chairman of the local Union Grievance Committee, Hardison had a ". . . permanent problem, not a temporary one" (Tr. App. 355).

A discharge hearing was held pursuant to the collective bargaining agreement resulting in Hardison's discharge on April 2, 1969 (Tr. App. 52).

After his discharge, Hardison failed to cooperate with the efforts of the union to process an appeal from the discharge hearing (Tr. App. 242, 352 and 357-362).

No defendant below made any statements impugning or expressing animus against Hardison's religious beliefs (Tr. App. 59). Mr. Kussman testified that he, ". . . respected the man's religious convictions and I do today."

C. Proceedings Below. After a full evidentiary hearing, the district court observed that it was, ". . . impressed with the men who were on the line handling the problem" (D. p. A64). The district court concluded that TWA established as a matter of fact that it took appropriate action to accommodate as required by Title VII and that it held several meetings, including a meeting it initiated, with Hardison in an attempt to find a solution. It did accommodate Hardison's observance of special religious holidays and authorized the union steward to search for someone who would swap shifts. Moreover, TWA would not have been placed in a position where it could not work out Hardison's problems had he not transferred, to suit his own convenience, to a shift where he knew he had insufficient seniority to bid a shift compatible with his Sabbath observance.[7] TWA could not simply let plaintiff have the time off and replace him since other work areas would be deprived of coverage and substitute employees for Hardison would be paid at overtime rates.[8]

---

7. Hardison's supposed reason in so transferring was because he had recently married. Hardison was later divorced by his wife for grounds of non-support (D. pp. A62-A63). Hardison did not contest the divorce on that ground even though his Bible permitted divorce only for fornication (D. p. A63).

8. The district court, it its opinion, referred to Edwards and Kaplan, *Religious Discrimination and the Role of Arbitration Under Title VII*, 69 Mich. L. Rev. 599, 628 (1971). The authors expressed concern that the duty to accommodate placed an intolerable burden on the employer. The district court stated that: "They described the burden of proving the absence of undue hardship as 'nearly impossible to demonstrate if the work force is large enough. . .' They rightly argue that such an interpretation imposes a priority of the religious over the secular in that it

(Continued on following page)

Notwithstanding the district court's firsthand observation of the witnesses' credibility, the court of appeals, after having the matter under advisement for 53 weeks, reversed. For the court, Judge Webster cited Matthew 27:24 and cast TWA in the role of "Pontius Pilate" (B. p. A37). He disagreed with the findings of fact by the district court and, essentially because of TWA's size, concluded: that Hardison had fully cooperated despite his voluntary shift transfer and failure to assist the union; that TWA could have permitted Hardison to work a four-day week despite being left shorthanded during one of its shifts or else having a supervisor or other worker transferred thereby causing work functions in other areas to suffer; that TWA could have violated the seniority provisions of the collective bargaining agreement despite no union consent being given; and that TWA could have incurred the additional expense of securing an overtime replacement.[9]

Footnote Continued—

might require an employer to favor employees whose religious beliefs require them to follow different schedules than the regular over other employees, even to the point of violating the other employees' bargained for rights" (citation omitted) (Tr. App. 235 and A. pp. A7-A8). The district court concluded that any other decision would raise constitutional questions (A. p. A9). The court of appeals, on the other hand, distinguished each case relied upon by TWA merely because of TWA's size (B. p. A10).

9. The court of appeals asserted that neither Hardison nor his religion would have benefited from such an accommodation; however, the district court sustained an objection to a question as to whether Hardison had agreed to share any recovery in this lawsuit with his religion (D. pp. A63-A64). It is, though, apparent that no other employee would have had a 4-day work week and no other religion would be able to require an employer to incur extra costs so that church members could supposedly attend church and make regular contributions.

REASONS FOR GRANTING THE WRIT

I. The Interpretation of the Statute and Guideline by the Court of Appeals Results in Innumerable Recurrent Nationwide Problems in the Administration of Uniform Work Rules in Collective Bargaining Agreements.

The decision of the court of appeals, far from enhancing less discrimination in employment, will require the employer and union to shift employees out of seniority and dispossess them of the protection of other uniform work rules to accommodate deviate religious beliefs. The court rendered the language of 42 U.S.C. § 2000e-2(h) that protects a, ". . . bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of . . . religion. . . ." meaningless surplusage. The court of appeals decision also erroneously establishes a standard of discrimination by effect despite the fact that the seniority agreement was not designed to lock in past discrimination. Under such circumstances, discrimination by effect is too onerous a standard, particularly in the subjective field of religious beliefs.

Many industries operate under collective bargaining agreements pursuant to important federal statutory schemes such as the Railway Labor Act (45 U.S.C. § 151, *et seq.*) and the National Labor Relations Act (29 U.S.C. § 151, *et seq.*). Those collective bargaining agreements cover thousands of employees. To require an employer, like TWA, to accommodate the various religious idiosyncracies of its thousands of employees would pose insurmountable problems in the performance of its seven-days-a-week airline operations. Those problems are magnified

to crisis proportion when employers are required to violate bona fide and completely nondiscriminatory seniority principles or other uniform work rules of collective bargaining agreements to accommodate the varying religious needs of thousands of employees. Furthermore, depriving a more senior employee of hard earned seniority rights or other uniform work rules is counterproductive to cardinal provisions of the Railway Labor Act and the National Labor Relations Act.

Accommodation of employee religious beliefs frequently simply cannot be made without disruption of work schedules and creation of inequitable or unfair preferential personnel practices. Many industries, like TWA, are engaged in continuous process operations. Shift stability and other uniform work rules are essential to avoid slowdowns, backups, wasted manpower and material, and, in TWA's case, to maintain airline schedules for the benefit of the public. Such industries, like TWA, operate twenty-four-hours-per-day, seven-days-a-week and 365 days each year. The court's speculation that TWA could simply permit a 4-day work week flies in the face of common sense, which tells us that the availability of full-time workers is required to insure proper and efficient work scheduling and coverage in complex industrial systems.

The court of appeals places the employer in an intolerable position. If he is a large employer, it is virtually impossible to prove an undue hardship. The employer must grant employees with deviate religious needs special privileges by requiring other employees (who may not even have any religious beliefs) to forego legitimate seniority rights. Additionally, the employer must incur grievances, morale and work scheduling problems and the extra cost of overtime replacements while the deviate employee is supposedly worshiping.

The court of appeals reached a result contrary to the district court solely by speculating that an employer with a large labor force can always accommodate the diverse religious needs of its employees without undue hardships. This unreasoned and unfounded speculation should not be the basis for permitting a finding of religious discrimination, particularly in the presence of TWA's efforts to accommodate Hardison and the absence of any discriminatory intent. The court of appeals, however, equates discrimination with inability to accommodate thereby greatly insuring the demise of all uniform work rules. That decision, based largely upon TWA's size, will preclude a contrary result in few other cases. The decision, therefore, is one of great importance in the religious discrimination area of Title VII because of its obvious impact upon all uniform work rules. Illustrative of the many other uniform work rules which the large employer and unions will find impossible to justify will be the payment of union dues or union shop agreements. See, for example, *Yott* v. *North American Rockwell*, 501 F.2d 398 (9th Cir. 1974). See also the dissent of Judge Celebrezze in *Cummins* v. *Parker Seal Company*, 516 F.2d 544 (6th Cir. 1975), petition for certiorari filed, 44 L.W. 3207 (U.S. Sept. 25, 1975) (No. 75-478).

When can an employer violate a bona fide nondiscriminatory seniority provision without incurring either liability for breach of agreements, union grievances, strikes or the embitterment of more senior employees who must forego such rights when they may not even have any religious beliefs? When can or must a union not process a grievance for violation of seniority provisions to satisfy the religious idiosyncracies of one of its members? How few employees may an employer have before he can be excused from accommodating a Moslem who wishes

to pray at various times throughout the day? How few baggage handlers or cargo loaders must TWA have before it can not accommodate employees whose religion prevented them from participating in the loading of liquor onto airplanes? Such questions are illustrative of the pervasiveness of the recurring problems engendered by the court of appeals decision which can only be finally resolved by this Court.

II. The Statute and Guideline Violate the Establishment Clause.

The importance and substantial character of the constitutional issues presented were recognized by both the district court and the court of appeals.[10] Indeed, the existence of "grave constitutional questions" was raised in the first key case concerning accommodation of an employee's religious beliefs. *Dewey* v. *Reynolds Metals Co.*, 429 F.2d 324, 334 (6th Cir. 1970), *aff'd* by an equally divided court, 402 U.S. 689 (1971). Distinguished legal scholars have also asserted that a construction of Title VII of the Civil Rights Act in the circumstances presented by this petition would constitute a violation of the establishment

---

10. The district court (Oliver, J.) stated that ". . . this Court is fully cognizant of the fact that the importance of the legal question presented is such that action taken by this Court and necessarily having to decide the question presented obviously will be appealed . . . first to the Court of Appeals and finally to the Supreme Court of the land, because I know of no case that presents the issue quite as sharply . . ." and that this ". . . is an ideal case to test the basic legal questions presented and that they are on their way to the Court of Appeals and eventually to the Supreme Court of the United States (D. p. A64). Similarly, the court of appeals stated that the appeal presented "important questions" for its review (B. p. A29); that the proper relationship between a bona fide seniority system and the requirement of reasonable accommodation had "not yet been settled by the Supreme Court" (B. pp. A42-A43) and that TWA's constitutional arguments were not "without articulate support" (B. p. A47).

clause of the First Amendment. See Edwards and Kaplan, *Religious Discrimination and the Role of Arbitration Under Title VII*, 69 Mich. L. Rev. 599, 628 (1971). Recently, in *Cummins* v. *Parker Seal Company*, *supra*, Judge Celebrezze dissented asserting that the religious accommodation requirement was a violation of the establishment clause. Significantly, a current law review note on recent developments in 44 Fordham L. Review 442 (1975) questions the approach of the two-judge majority in *Cummins* and supports the rationale of Judge Celebrezze's dissent. See also *Reid* v. *Memphis Publishing Co.*, 521 F.2d 512, 524 n.1 (6th Cir., 1975).

Judge Celebrezze's challenging dissent identifies the danger inherent in the court of appeals decision. If Congress is permitted to breach the First Amendment by granting benefits to religion, it is thereby empowered to breach it to take away religious freedoms. The same fear was eloquently expressed by a great religious constitutional scholar, the late Paul G. Kauper, in 18 Mich. Law. Quad. Notes No. 2, p. 17, 1974, "In our pluralistic society with its diverse religious elements no single religion can claim for itself a favored position in the law, and the law in turn may not reflect the views of a single religious community."

Application of the three-part test set forth in *Committee for Public Education and Religious Education and Religious Liberty* v. *Nyquist*, 413 U.S. 757 (1973), requires a finding that Title VII, as construed by the court of appeals, is violative of the establishment clause.

First, the statute and guideline lack a primary "secular legislative purpose". The legislative history of the 1972 amendment contains no suggestion that religious discrimination in employment was a problem requiring remedial legislation.[11] Rather, the purpose, as explained by its sponsor, Senator Randolph, was admittedly to stem the "dwindling of the membership of some religious organizations" which prohibit Saturday labor and because of a "possible inability of employers on some occasions to adjust work schedules to fit the requirements of the faith of some of their workers." 118 Cong. Rec. 705 (1972). Thus, the 1972 amendment and EEOC regulation were explicitly designed to benefit members of particular religious groups without regard to employers' normal work schedules or the rights of other employees who may not believe in that religion or who have no religious beliefs. The statutory purpose to foster religion could not be clearer.

Second, the statute and guideline have the direct and immediate effect of advancing religion. The law unquestionably requires an employer to discriminate in favor of individual employees on the basis of their religious beliefs. Indeed, as construed by the court of appeals, it requires an employer solely because of an empioyee's religious beliefs to incur overtime charges for replacement

---

11. There was at best sparse evidence of religious (as opposed to racial) discrimination before Congress when it passed the 1964 Civil Rights Act. According to Congressman Celler, Chairman of the House Judiciary Committee:

> We did not have very much testimony of discrimination on the grounds of religion. You will notice in one of the titles, religion is left out. . . .
>
> We had very little evidence—I do not think we had any of it insofar as the Committee on the Judiciary is concerned that any particular sect or religion had been discriminated against. 110 Cong. Rec. 1528-29 (1964).

Senator Randolph specifically mentioned the Orthodox Jews, the Seventh-day Adventists, and the denomination to which he himself belonged, the Seventh-day Baptists. In this connection he stated:

> My own pastor in this area, Rev. Delmar Van Horn, has expressed his concern and distress that there are certain faiths that are having a very difficult time, especially with the younger people. . . . 118 Cong. Rec. 705 (1972).

employees, reduce the work coverage of other areas, or violate, without union consent, a bona fide and nondiscriminatory seniority provision. Thus, governmental sanction is placed upon the practice of facilitating and encouraging employees to require time off for religious observances so that employees with religious beliefs are aided as against nonbelievers. There simply is no evidence that the law is "evenhanded in operation" or "neutral in primary impact". *Gillette* v. *United States*, 401 U.S. 437, 450 (1971).

To meet the requirement of a clearly secular purpose, the law must be neutral as it affects believers and nonbelievers as well as neutral in intent and effect. *Everson* v. *Board of Education*, 330 U.S. 1, 15 (1947); *Committee for Public Education & Religious Liberty, supra;* and *Torasco* v. *Watkins*, 367 U.S. 488, 495 (1961). In application, the 1972 amendment and guideline require nonbelieving employees to bear the burden, inconvenience and expense of the deviate religious practices of others.[12] Thus, as construed by the court of appeals, the law is not neutral in either intent or effect.

While there is no need to reach the third part of the test, the statute and guideline patently require pervasive and excessive government entanglement with religion. The law requires a court to make a determination as to the sincerity and depth of the employee's beliefs.[13] The court must then evaluate the employer's efforts to accommodate which undoubtedly involves courts in a most

12. In criticizing the thrust and impact of the EEOC's regulations, Edwards and Kaplan present compelling hypotheticals and arguments undercutting the constitutional framework for both the regulation and the statute as later amended. See page 628 of their above-noted article. The authors criticize the EEOC guidelines, *inter alia*, because they appear to be premised on a fundamentally distorted conception of the proper place of religion in a secular society.

13. See 44 Fordham L. Rev. 442, 449, n.61 (1975).

subjective area. Moreover, the EEOC has promulgated extensive, and oftentimes contradictory, guidelines governing what an employer must do under the law. *Yott, supra* at page 399. Those guidelines affect the employer, the accommodated employee and all other employees. The government is thus inextricably involved in serious practical problems for employers, employees and labor organizations in the scheduling of work assignments and the application of other uniform work rules so as not to conflict with the large variety of existing religious practices.

The court of appeals relied upon *Gillette* v. *United States, supra; Griggs* v. *Duke Power Company*, 401 U.S. 424 (1971); and *McGowan* v. *Maryland*, 366 U.S. 420 (1961). The court's reliance on such cases is misplaced. *Gillette* involved a criminal prosecution in which this Court rejected a claim that an exemption from service was available to persons conscientiously opposed to participation in war in any form.[14]

Griggs also is not controlling here because it dealt with the special and unique area of racial discrimination which, as the district court noted, caused a significant "judicial gloss" to be placed on that decision. To rely on *Griggs* would, in essence, require findings of religious discrimination in the subjective area of religious beliefs whereas one's race is clearly not the result of a subjective decision. Nor does the establishment clause have any relationship to racial discrimination. *Griggs* was simply never meant to require a finding of religious discrimination respecting an admittedly bona fide seniority agreement that was not intended to discriminate against any religion and which did not lock in past discrimination. See 42 U.S.C.

14. The two-judge majority in *Cummins* v. *Parker Seal Company* also relied on *Gillette*. That reliance was questioned in 44 Fordham L. Rev. 442, 449 (1975) and by Judge Celebrezze's dissent.

§ 2000e-2(h). Similarly, the Sunday closing cases are not apt as they are altogether different because of the existence of the secular purpose to set aside a uniform day of rest and recreation.[15]

Title VII, as misconceived by the court of appeals, completely overlooks the teaching of Learned Hand in *Otten* v. *Baltimore & O.R.R.*, 205 F.2d 58, 61 (2d Cir. 1953) wherein the importance of proper deference to the need for an individual to also accommodate and compromise his religious beliefs was cogently stated:

> The First Amendment protects one against action by the government . . . but it gives no one the right to insist that in the pursuit of their own interests others must conform their conduct to his own religious necessity. . . . We must accommodate our idiosyncracies, religious as well as secular, to the compromises necessary in communal life; and we can hope for no reward for the sacrifices this may require beyond our satisfaction from within, or our expectations for a better world.

III. The Decision of the Court of Appeals Conflicts With the Decisions of Other Courts of Appeal As to the Determination of Whether a Reasonable Accommodation Without Undue Hardship Is Possible.

The court of appeals, in reversing the district court, reached a decision that admittedly is in direct conflict

---

15. Any applicability of the Sunday closing laws would seemingly support TWA's position because such cases clearly required many persons to compromise or adjust their individual religious practices to the realities of "communal life" just as Hardison could have done by not transferring to the shift where he knew he would have difficulties in observing his Sabbath.

with the ruling of the Court of Appeals for the Sixth Circuit in *Reid* v. *Memphis Publishing Co., supra.* See note 5 of the court of appeals decision (B. p. A37). In *Reid*, the defendant newspaper declined to hire the plaintiff, as a copyreader, because for religious purposes he refused to work on Saturdays. The only significant differences between this case and *Reid* are that (1) unlike TWA, the defendant employer in *Reid*, "made no effort whatsoever to accommodate *plaintiff Reid's religious beliefs.*" Id. at 523 (Edwards, J. dissenting [emphasis in original]); and (2) the employer in *Reid* did not have to violate a bona fide nondiscriminatory seniority agreement to accommodate the plaintiff. The district court granted judgment to Reid. The court of appeals reversed, concluding that the difficulties feared—but never experienced—by the employer amounted to "undue hardship" within the meaning of Title VII.

The court of appeals decision is also in irreconcilable conflict with the decisions of the Fourth and Fifth Circuit Courts of Appeal in *Johnson* v. *U. S. Postal Service*, 364 F. Supp. 37, *aff'd* 497 F.2d 128 (5th Cir. 1974), and *Roberts* v. *Hermitage Cotton Mills*, 8 F.E.P. 315 (D.C. S.C. 1973), *aff'd* 8 F.E.P. 319 (4th Cir. 1974). Both cases concerned Saturday work for members of the Worldwide Church of God just as in this case. In both cases, the courts upheld the employer, in large part, because the employer had a need for Saturday work and to accommodate would have required forcing more senior employees to replace the accommodated employee. However, in neither case was there any evidence of the existence of a bona fide nondiscriminatory collective bargaining agreement as presented in this petition. Nor is there evidence in either case that the employers endeavored to accommo-

date the work problem as long and thoroughly as TWA did. Despite its efforts to accommodate, TWA is found guilty of religious discrimination while the employers in *Johnson* and *Roberts* escape liability.[16]

Thus, TWA, which strived for accommodation for over six months and which actually accommodated Hardison on both his religious holidays and Sabbath until he voluntarily transferred to a shift in which he knew he would have difficulties, is held to be guilty of religious discrimination even though it would have violated bona fide seniority rights of other employees and incurred overtime wages for a replacement to make further accommodation. The employers in *Reid*, *Johnson* and *Roberts*, on the other hand, who made no efforts to accommodate in less difficult factual settings, escape liability. The only discernible difference in the decisions is the makeup of the different courts which heard the cases. That irreconcilable divergence of views among the courts of appeal mandates this Court's corrective action to achieve consistent administration of the statute.

---

16. TWA recognizes that this Court is mainly concerned with conflicts between the circuit courts of appeal; however, the decision below is also in admitted conflict with the opinion in *Dawson* v. *Mizell*, 325 F. Supp. 511 (E.D. Va. 1971) (Merhige, J.). The facts of *Dawson* are, in essence, undistinguishable from this petition including the existence of a seniority provision preventing accommodation. Judge Merhige agreed that the employee could have simply been granted a Saturday off for his religious purposes without really affecting the operation of the Post Office, but the court refused to overlook the fact that, like here, thousands of other employees were governed by the collective bargaining agreement which would have been violated. There was also evidence that the employees, as TWA's employees, considered seniority rights to be of utmost importance. The only distinguishing feature of that case to this petition is that the employer in *Dawson* escaped liability because the court refused to equate religious discrimination with an inability to accommodate.

IV. The Court of Appeals Created a De Novo Review at the Appellate Level in Cases Pertaining to Religious Discrimination in Derogation of Rule 52(a) of the Federal Rules of Civil Procedure Thereby Requiring the Exercise of This Court's Supervisory Powers to Avoid Recurrent Problems.

While this Court only infrequently hears matters involving the "clearly erroneous" provision of Rule 52(a) of the Federal Rules of Civil Procedure, nevertheless, special and important reasons for the granting of certiorari are presented in this case because of the apparent trend among courts of appeal in religious discrimination cases under Title VII to substitute new findings of fact for those of the district court.[17]

The danger of countenancing *de novo* trial on appeal was recognized by Judge Engel in his recent dissent in the religious discrimination case of *Draper* v. *U. S. Pipe & Foundry Co.*, 44 U.S.L.W. 2295 (6th Cir., December 12, 1975), 11 F.E.P. 1106, 1113 (6th Cir. 1975):[18]

---

17. The following eight decisions involve reversals of district court findings and opinions in the religious discrimination area. *Dewey* v. *Reynolds Metals Company*, 429 F.2d 324 (6th Cir. 1970); *Riley* v. *Bendix Corporation*, 464 F.2d 1113 (5th Cir. 1972); *Reid* v. *Memphis Publishing Company*, 468 F.2d 346 (6th Cir. 1972); *Young* v. *Southwestern Savings & Loan*, 509 F.2d 140 (5th Cir. 1975); *Cummins* v. *Parker Seal Company*, 516 F.2d 544 (6th Cir. 1975); *Reid* v. *Memphis Publishing Company*, 521 F.2d 512 (6th Cir. 1975); *Draper* v. *U. S. Pipe & Foundry*, ... F.2d ..... (6th Cir. 1975); and *Hardison* v. *Trans World Airlines, Inc.*, ... F.2d ..... (8th Cir. 1975). But in *Johnson*, *supra*, and *Roberts*, *supra*, district court findings were held not to be clearly erroneous. The latter two cases held for the employer and are factually similar to this case.

18. *Draper* is apparently the most recent of the widely differing Sixth Circuit opinions concerning Title VII religious discrimination cases. The court reversed the district court and held for the employee upon the supposed basis of clearly erroneous findings by the district court. Judge Engel strongly dissented by setting forth the district judges' findings of fact which

(Continued on following page)

"Finally, I am unable to veil a growing concern on my part that those who read our majority decision here and in Reid and Cummins may conclude that in this area of law our circuit in effect has instituted a practice of de novo review at the appellate level.

The area of accommodation to religious beliefs is a new and sensitive one. Nevertheless, I hope that we can ultimately approach it in a way which is more consistent with the essentially different roles of the trial and appellate courts."

The wide disparity in the approach of the district court and the court of appeals is demonstrated in their respective views of TWA's efforts to accommodate. The district court observed ". . . I again make the observation that I was impressed with the men who were on the line handling the problem." (D. p. A64) The court of appeals, on the other hand, relegated TWA the role of a "Pontius Pilate" (B. p. A37).

There is no justification for the court of appeals ignoring the district court's findings and retrying the case on the written record, giving no weight to the great advantage Judge Oliver had in seeing, hearing and judging the credibility of the witnesses. The opinion by the court of appeals leads the reader to believe that TWA did nothing

---

Footnote Continued—

discussed the factual concern of the two-judge majority. He found it a "surprise" that the findings could be deemed clearly erroneous and stated: "What makes the district court's findings here so especially entitled to credit is the fact that there is absolutely no suggestion of religious bias or prejudice in the record. Draper was a valued and greatly needed employee who enjoyed a close friendship with the man who finally discharged him. These additional circumstances strongly support a finding that the company was willing to and did undergo considerable hardship in order to retain him. This is not a case where Draper's discharge was pretextual, masking a latent bias against his faith or against him for adhering to it." (11 F.E.P. 1106, 1112-13).

to accommodate when, in fact, it did much. The court of appeals mistakenly found that there were 200 other employees available to substitute for plaintiff on the mere whim of TWA when, in fact, TWA had a greatly reduced work force of only 38 to 40 people in the entire job area on weekends and its employees preferred not to work on weekends. Moreover, Hardison was the only person performing his job on the weekends and the seniority provisions would require depriving other employees of their rights if a swap was arranged. TWA did authorize the union steward to contact all employees and it was his function to do so (Tr. App. 293, 301, 302, 313). The court of appeals also erroneously stated that Hardison was only required to work on his Sabbath for a temporary time.[19] Similarly, the court compounds its mistaken view of the facts by asserting that the additional cost to TWA to accommodate Hardison was not clear from the record.

---

19. Hardison's problem was permanent and did not lessen when the junior man returned from vacation. Illustratively, Hardison's charge of employment discrimination recited that he was scheduled to work on his Sabbath when Wyatt left only for a two week vacation (D. p. A61). Hardison's own counsel elicited the testimony that Hardison was to replace Wyatt only on March 8 and March 15 (D. p. A61). Hardison did not report to work as scheduled on the next Saturday, March 22. Further, Hardison transferred to a twilight shift from which he left work after sundown on Friday, March 28, 1969. *A fortiori* if his problem was only because of the two week vacation, Hardison would not have transferred shifts. There was no doubt in the union's mind that Hardison simply was never going to work on a Saturday and that he had a "permanent problem, not a temporary problem" (Tr. App. 346, 355).

The district court made the following explicit finding:

After the meeting, but before the discharge hearing, Plaintiff changed his shift to the twilight shift, which permitted him to have Saturdays off. The testimony was that the union believed at this time that its problems were solved (Tr. 391). But on March 28, 1969, Plaintiff quit work at sundown and it became immediately apparent that the union would not be able to argue that Plaintiff should not be dismissed because his conflicts had been resolved (Tr. 391-392).

In reaching that conclusion, the court ignored the stipulation of the parties that set forth the hourly rate of employees (Tr. App. 79). The evidence that a shift consisted of some 8 hours and that replacement time for Hardison would range from time and one-half to double time was undisputed (Tr. App. 85, 300). The cost to TWA could not have been more explicit. Significantly, nowhere in Hardison's suggested findings of fact was it argued that his problem was a mere temporary one or that the cost which TWA would incur to accommodate was not determinable from the record (Tr. App. 82-112).

This Court should exercise its supervisory powers to insure that Rule 52(a) is respected so that future litigants will be afforded the application of the clearly erroneous rule in the sensitive matters presented in Title VII religious discrimination cases. The essentially different roles of the trial and appellate courts must be respected.

CONCLUSION

For all the foregoing reasons, Petitioner respectfully submits that this petition should be granted, and a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

DICK H. WOODS
GEORGE E. FELDMILLER
STINSON, MAG, THOMSON, MCEVERS & FIZZELL
2100 TenMain Center
Kansas City, Missouri 64105
(816) 842-8600
Attorneys for Trans World Airlines, Inc.

Of Counsel:

RAYMOND R. FLETCHER, JR.
Vice President and General Counsel

JAMES J. MOLLENKAMP
Assistant General Counsel
Trans World Airlines, Inc.
Post Office Box 20126
Kansas City International Airport
Kansas City, Missouri 64195
(816) 891-7500

February 6, 1976

APPENDIX

APPENDIX A

Larry G. HARDISON, Plaintiff,

v.

TRANS WORLD AIRLINES et al.,
Defendants.

No. 20096-1.

United States District Court,
W. D. Missouri, W. D.
May 15, 1974.

MEMORANDUM AND ORDER

JOHN W. OLIVER, District Judge.

This is an action by an individual plaintiff against his former employer, Trans World Airlines (TWA) and three labor organizations, International Association of Machinists and Aero Space Workers (The International), International Association of Machinists and Aero Space Workers, District 142 (District 142), and International Association of Machinists and Aero Space Workers, Local 1650 (Local 1650) seeking redress from alleged religious discrimination in violation of the Civil Rights Act of 1964. Plaintiff asserts that his discharge from employment because of his refusal to work from sundown Friday to sundown Saturday pursuant to the tenets of his religion was

a violation of his religious liberty, contrary to 42 United States Code, § 2000e-2. Plaintiff is a member of the World-wide Church of God.

The jurisdiction of this Court is based upon 42 United States Code, § 2000e-5(f). Defendant TWA is an employer engaged in interstate commerce and subject to Title VII of the Civil Rights Act of 1964, 42 United States Code, § 2000e et seq. Defendant unions are labor organizations likewise subject to the provisions of Title VII.

I.

Defendants first argue that this Court does not have jurisdiction in this case because of the alleged failure of the plaintiff to comply with the filing deadline of 42 U.S.C. § 2000e-5(d). That argument is answered by the decision of our controlling court in Richard v. McDonnell Douglas Corporation, 469 F.2d 1249 (8th Cir. 1972), which held that the 210-day statute of limitations is tolled upon receipt of the complainant's complaint by the E.E.O.C. Accordingly, in this case plaintiff's complaint of August 29, 1969, tolled the 210-day statute of limitations so that even if we assume that the E.E.O.C. assumed jurisdiction of plaintiff's case on November 18, 1969, the latest arguable date, plaintiff perfected his federal remedy well within the proper time. We find and conclude, therefore, that we do have jurisdiction of this case under the provisions of 42 U.S.C. § 2000e-5(d).

The defendant International challenges this Court's jurisdiction over it on the ground that there was no proper service of process on that organization. The alleged service was made by serving a copy of the complaint on James Tarwater, the financial secretary of Local 1650, who had no official capacity with the International.

We find and conclude that Local 1650 and The International are not autonomous and that, therefore, service upon the local constitutes valid service of process on The International. See Deboles v. Trans World Airlines, Inc., 350 F.Supp 1274 (E.D.Pa.1972) and Claycraft Co. v. United Mine Workers of America, 204 F.2d 600 (6th Cir. 1953).

We further find and conclude that because Local 1650, District 142, and The International are not autonomous, the interests of the latter two organizations were adequately represented before the E.E.O.C. by Local 1650. The argument, therefore, of defendants, District 142 and The International, that they could not be sued in federal court because they were not named in the complaint before the E.E.O.C. is without merit. See Moody v. Albemarle Paper Co., 271 F.Supp. 27 (E.D.N.C.1967).

Defendants argue also that plaintiff failed to exhaust his administrative remedies, first, because he did not pursue administrative remedies set out in the Railway Labor Act (45 U.S.C. § 151 et seq.) and, second, because he did not otherwise pursue contract grievance procedures. The first argument is answered by Norman v. Missouri Pacific Railroad, 414 F.2d 73 (8th Cir. 1969), which reversed the district court's dismissal of a complaint filed pursuant to Title VII of the Civil Rights Act of 1964. The Court of Appeals held that the complaint was cognizable under the Civil Rights Act absent specific prohibitions in the Railway Labor Act and that the Railway Labor Act did not foreclose efforts of employees to secure their statutory rights under the Civil Rights Act. No specific prohibition in the Railway Labor Act has been cited by defendants.

The second argument is answered by the recent decision of the Supreme Court in Alexander v. Gardner-

Denver Co., 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed.2d 147 (February 19, 1974), which held that an employee is not foreclosed from suing in federal court under Title VII of the Civil Rights Act of 1964 after arbitration proceedings resulted in an unfavorable ruling. The Court concluded that no election of remedies principles inhered in Title VII. Submission of a claim to one forum does not preclude a later submission to another, Justice Powell declared in the majority opinion. It follows, therefore, that plaintiff can choose to proceed under Title VII without resorting to grievance procedures at all.

II.

The relevant factual circumstances of this case are not substantially disputed. Many of the facts stipulated by the parties in Standard Pretrial Order No. 2 are simply not relevant. Other findings suggested by the parties in which there is dispute are for the most part irrelevant. The facts as we have found them include only those relevant to the resolution of the legal questions presented and for the most part are those which admit of very little dispute. The following discussion will serve as our findings of fact and conclusions of law pursuant to Rule 52(a), Federal Rules of Civil Procedure.

A. *Union Responsibility*

Plaintiff names the three union defendants in his complaint and asks for an injunction against the unions to prevent them from failing to adequately represent the plaintiff and from depriving plaintiff of his right to freely exercise his religious beliefs without discrimination by the union. In his suggested conclusions of law, plaintiff states merely that defendant unions "discriminated against plaintiff by reason of his religion in violation of the Civil Rights

Act of 1964 by enforcing a collective bargaining agreement which was discriminatory against plaintiff in its application." Plaintiff cites a number of cases in support of this proposition without discussion. We have studied all of those cases. Most are entirely irrelevant to the issue of whether the union should be held responsible for the violation, if any, of the Civil Rights Act of 1964. Others are relevant only by broad application of the principles stated therein.

Labor union compliance with the Civil Rights Act of 1964 is dictated by 42 U.S.C. § 2000e-2(c):

> It shall be an unlawful employment practice for a labor organization—
>
> (1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;
>
> (2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

Although it is nowhere stated directly by plaintiff, it appears that he is complaining that the union discrimi-

nated against him because of its failure to refuse to comply with the seniority provisions of the collective bargaining agreement between TWA and The International, which governed plaintiff's employment. A violation of those provisions would have been required in order to adjust his schedule with one of the other workers on his shift so that he would be able to observe his Sabbath.

Plaintiff, in arguing that the Unions discriminated against him by "enforcing a collective bargaining agreement which was discriminatory against plaintiff in its application," is arguing that the Union acted wrongly by standing by the contract and refusing actively to support plaintiff's efforts to avoid the seniority provisions of the contract. This actually amounts to an assertion that the Union has a rather stringent duty to accommodate.

The duty to accommodate, which we shall discuss in more detail later in this opinion, at the time the alleged discrimination in this case took place, was required by E.E.O.C. guideline 29 C.F.R. § 1605.1:

> (b) The Commission believes that the duty not to discriminate on religious grounds, required by Section 703(a)(1) of the Civil Rights Act of 1964, includes an obligation *on the part of the employer* to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business. [Emphasis supplied]

The Unions interpret this language to mean that the duty is imposed only on the employer. They argue that that limitation was intentional because, they contend, a union has no power to accommodate. The Union only has power to control its own organization, make collective bar-

gaining agreements with the employer, and enforce those agreements. The employer, the Unions conclude, is the only one who is in a position to accommodate.

We disagree. The language of the regulation does speak in terms of the employer but so have other provisions and regulations pursuant to the Act, which have been interpreted to include the union. For example, 42 U.S.C. § 2000e-2(h), the provision on seniority systems discussed below has been applied to unions. See, e. g., Local 189, United Papermakers and Paperworkers v. United States, 416 F.2d 980 (5th Cir. 1969).

Furthermore, this case is a perfect example of a situation in which a union could accommodate a member if required to do so. TWA agreed that plaintiff could change shifts if the union approved. Such approval would mean that the union would have to suspend the operation of the seniority rules in plaintiff's case. Had the union made this accommodation, plaintiff would have been able to observe his Sabbath as he wished. The question, however, is whether Title VII imposed upon the unions the duty to ignore their contract under the circumstances of this particular case.

We do not believe that Title VII goes that far. We find and conclude that to require the union to ignore seniority in every case in which an employee with lesser seniority can observe his Sabbath only by changing shifts with a more senior employee would work an undue hardship on the union.

In an article written after Dewey v. Reynolds Metals Co., 429 F.2d 324 (6th Cir. 1970), Professor Harry E. Edwards and Mr. Joel H. Kaplan expressed concern that the E.E.O.C. regulation imposing the duty to accommodate places an intolerable burden on the employer. They de-

scribed the burden of proving undue hardship as "nearly impossible to demonstrate if the work force is large enough." Edwards and Kaplan, Religious Discrimination and the Role of Arbitration Under Title VII, 69 Mich.L. Rev. 599, 628 (1971). They rightly argue that such an interpretation "imposes a priority of the religious over the secular" in that it might require an employer to favor employees whose religious beliefs require them to follow different schedules than the regular over other employees, even to the point of violating the other employees' bargained for rights. The same considerations apply in the case of the unions.

The labor-management contract to which the union is a party clearly sets out the seniority rules which are binding on the company and the union (Article VI(b), Pl.Ex. 30). That contract, of course, can not operate in violation of the laws of the United States but we do not believe that Title VII requires that the seniority provisions be ignored. Professor Edwards and Mr. Kaplan discuss this problem at length:

> Assume that an employer operates a seven-day-a week operation, that he has entered into a collective bargaining contract with the union, and that the contract provides for shift preference by seniority. What if a low-seniority employee, who works a shift that includes Saturday and Sunday, converts to a religion that requires him not to work on one of those days? Must the employer then transfer this employee out of a Sunday or Saturday shift even though numerous employees with greater seniority are required to work over the weekend? Under the E.E.O.C. guidelines, the transfer of one employee could hardly be said to create an "undue hardship" for the employer, but what of the other employees? What of the hardship imposed

> on the employee who waited a long time to acquire sufficient seniority in order to avoid weekend work and is now forced back into it because of someone else's religious beliefs? Are the religious beliefs of one individual so weighty that they supersede the lack of religious beliefs of another? [69 Mich.L.Rev. at 628].

Professor Edwards and Mr. Kaplan argue that the E.E.O.C. guidelines are confusing and could be construed to require the employer in every case to shift an employee out of seniority to accommodate religious beliefs. We do not believe that the E.E.O.C. guidelines require such a result. The hardship on employees should certainly be considered as hardship on the conduct of business, for the management of employees is one of the chief concerns of a large business and, in the case of a labor union, is the chief concern. A hypertechnical application of the words "undue hardship of the employer's business" by ignoring this fact, would, as Professor Edwards and Mr. Kaplan argue, impose "a priority of the religious over the secular" [69 Mich.L.Rev. at 628] and would perhaps raise constitutional questions.[1] See Dewey v. Reynolds Metals Co., 429 F.2d 324, 334-335 (6th Cir. 1970). We find and conclude, therefore, that it would have been an undue hardship for the unions to have changed plaintiff's shift in violation of the seniority provisions of the labor management contract.

---

1. Professor Edwards and Mr. Kaplan direct attention to Judge Learned Hand's decision in Otten v. Baltimore & Ohio R.R., 205 F.2d 58, 61 (2d Cir. 1953), in which he stated:

> The First Amendment protects one against action by the government . . . but it gives no one the right to insist that in the pursuit of their own interests others must conform their conduct to his own religious necessities. . . . We must accommodate our idiosyncrasies, religious as well as secular, to the compromises necessary in communal life; and we can hope for no reward for the sacrifices this may require beyond our satisfaction from within, or our expectations of a better world.

Finally, with reference to the seniority provisions, we find and conclude that 42 U.S.C. § 2000e-2(h), if not absolutely controlling, at least indicates that Congress did not intend that unions or employers be required to take actions that could impinge upon bona fide seniority systems. That Section reads as follows:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin. [42 U.S.C. § 2000e-2(h)].

A significant judicial gloss has been placed on this language by courts processing racial discrimination cases. Consequently, a seniority system can not be "bona fide" if it perpetuates the consequences of past discrimination. In other words, a seniority system is not lawful if it freezes Negroes into past patterns of discrimination. See Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971), cert. dismissed, 404 U.S. 1006, 92 S.Ct. 573, 30 L.Ed.2d 655 (1971); Local 189, United Papermakers and Paperworkers, AFL-CIO, CLC v. United States, 416 F.2d 980 (5th Cir. 1969); and Quarles v. Philip Morris, Inc., 279 F.Supp. 505 (E.D. Va.1968).

Plaintiff does not urge, nor, do we think, may he urge, that the seniority system in this case locked in any discrimination against individuals of plaintiff's or anyone else's religion. The seniority system was not designed with the intention to discriminate against religion nor did it act to lock members of any religion into a pattern

wherein their freedom to exercise their religion was limited. It was coincidental that in plaintiff's case the seniority system acted to compound his problems in exercising his religion. He did not have sufficient seniority in the building to which he transferred to be able to impose his choice of days off over those of the other employees who had more seniority.

The duty to accommodate under the circumstances of this case, therefore, did not require the union to ignore its seniority system. It did, however, require that the union fairly represent the plaintiff when it became aware of the fact that plaintiff was facing difficulty in scheduling for his Sabbath and that he was in danger of disciplinary action by the company. See Macklin v. Spector Freight Systems, Inc., 478 F.2d 979, 988 (D.C.Cir. 1973), and United States v. Bethlehem Steel Corp., 312 F.Supp. 977, 988 (W.D. N.Y.1970), rev. on other grounds, 446 F.2d 652 (2nd Cir. 1971). A union always has an affirmative duty to protect its members from unlawful discrimination in its area of authority, i. e., negotiating a nondiscriminatory contract, Robinson v. Lorillard Co., *supra*; or processing grievances of discrimination, United States v. Bethlehem Steel Corp., *supra*.

In this case, since the collective bargaining agreement was essentially nondiscriminatory, it can only be argued by plaintiff that the unions failed to properly process his grievance. We do not believe that the facts sustain such a charge.

The union first learned about plaintiff's problem at a meeting that Hardison had with Everett Kussmann, Manager, Stores Systems, on September 6, 1968, and at which James Tinder, Local 1650 steward, was present. At that meeting, plaintiff's requirements for time off on religious holidays were discussed and Kussmann agreed that the

steward should seek to swap days off, to excuse time off on specific religious holidays if plaintiff agreed to work on regular holidays, and to attempt to find plaintiff another job (Pl.Ex. 16). There was no evidence that Tinder took any active part in that meeting. After the meeting plaintiff, on October 9, 1968, wrote Kussmann stating his satisfaction in the arrangements discussed and advising Kussmann that he had transferred to the 11 to 7 shift, which did allow him to observe his Sabbath (Pl.Ex. 2).

On December 2, 1968, plaintiff voluntarily transferred from Building 1 where he had sufficient seniority to bid on a shift which would allow him to observe his Sabbath, to Building 2, where he was second from the bottom in seniority.

Kussmann arranged for a meeting to be held on March 6, 1969 to discuss ways to avoid any difficulty that might arise because of plaintiff's new schedule. The Local 1650 steward, Mr. Tinder, was present at that meeting. Apparently several possibilities for meeting plaintiff's requirements were proposed: (1) changing plaintiff's shift; (2) changing plaintiff's job; and (3) allowing plaintiff to work four days a week. Tinder was amenable to working out plaintiff's problem on any of the above bases, subject, however, to the seniority provisions of the contract. On that date there were no jobs open for bid nor did plaintiff have sufficient seniority to bid on any other job (Tr. 168). The seniority provisions, therefore, precluded the possibility of plaintiff's changing his shift (Tr. 82-85, 154-155, 157-169, 193, 225-227). They also prevented plaintiff from changing his job (Tr. 167-168). The company was unwilling to permit plaintiff to work only four days a week (Tr. 270).

Plaintiff, therefore, was not satisfied with the results of this meeting. He did not, however, file a grievance with

the grievance committee as he knew he had a right to do (Tr. 169).

Plaintiff was absent from work on March 8, March 15, and March 22, 1969. On March 21, plaintiff met with A. J. Butcher, Supervisor, Stores Planning and Control, and James Tinder. As a result of that meeting Butcher wrote plaintiff on the same day advising him that a discharge hearing would have to be scheduled (Pl.Ex. 6).

Before the discharge hearing, the grievance committee met with plaintiff for approximately an hour and discussed the possible approaches to resolving the problem. Finally, the grievance committee decided that the best approach would be for plaintiff to remain on the job, pleading for leniency at the discharge hearing, and if that hearing resulted in discharge, to attempt to obtain a reversal of that decision at a higher level (Tr. 385). The possibility of the union waiving its seniority provisions so that plaintiff could get on a different shift was apparently not discussed (Tr. 389-391). Plaintiff told the committee to use its own judgment in presenting the grievance (Tr. 387).

After the meeting, but before the discharge hearing, plaintiff changed his shift to the twilight shift, which permitted him to have Saturdays off. The testimony was that the union believed at this time that its problems were solved (Tr. 391). But on March 28, 1969, plaintiff quit work at sundown and it became immediately apparent that the union would not be able to argue that plaintiff should not be dismissed because his conflicts had been resolved (Tr. 391-392).

Immediately prior to the discharge hearing on March 31, 1969, the union held another meeting with plaintiff and reviewed the various approaches to the problem and the procedures for appealing to District 142 if the company

decided to discharge plaintiff (Tr. 392-393). Plaintiff was told that he should sit next to Earl Box, Chairman of the Grievance Committee, so he could object to any errors made by the Committee.

At the hearing, the union argued against discharge on the grounds that procedural errors had been made and that discharge was too severe a penalty for the infractions with which plaintiff was charged (Joint Stip. 31).

Immediately after the discharge hearing Box again explained the appeals procedure to plaintiff (Tr. 397). On April 12, 1969, a letter was sent to plaintiff explaining that he had been found guilty of insubordination and was therefore, discharged. Several days later plaintiff again met with the Grievance Committee and asked about the possibilities of his resigning to keep his record clean. He was told that the company would probably not accept his resignation and was again told of appeal procedures and that the Local would forward the case to the District (Tr. 398).

Joseph Whitney Bowers, General Chairman of District 142, attempted several times but was unable to contact plaintiff (Tr. 446, 452). He finally arranged two different meetings with plaintiff, through plaintiff's father-in-law, Cyrus See (Tr. 444, 457). Plaintiff failed to make either one of them and Bowers, pursuant to standard procedures, dropped the case (Tr. 405-406).

In light of our findings of fact with regard to the union's actions in processing plaintiff's case, we find and conclude that the unions did not violate their duty to plaintiff under Title VII of the Civil Rights Act of 1964.

The duty of fair representation requires that the union act in good faith and without malice. See Vaca v. Sipes, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967). We do not find that Local 1650's representation of the plaintiff

in his dispute with TWA was arbitrary, discriminatory, or in bad faith. Any failure on the part of District 142 to pursue the matter after discharge was due entirely to plaintiff's lack of cooperation, which made it impossible to proceed with an appeal. The problem never reached The International. We find and conclude, therefore, that judgment should be entered in favor of the three union defendants.

B. *TWA Responsibility*

Defendant TWA makes several arguments against plaintiff's contention that it violated Title VII of the Civil Rights Act of 1964 when it discharged him:

[1] A statutory requirement to accommodate religious needs of employees would violate the Establishment Clause of the First Amendment.

[2] Title VII of the Civil Rights Act of 1964 does not require employers to affirmatively accommodate employees' religious needs.

[3] TWA made reasonable accommodations to plaintiff's religious beliefs up to the point where further steps would have caused undue hardship.

[4] Plaintiff voluntarily placed himself in a position which he knew or should have known would diminish his chances for Sabbath observance.

[5] TWA did not "intentionally" discriminate against plaintiff on account of his religious beliefs. [Def. TWA Brief, pp. 35-36].

The first question that must be resolved is indicated by # 2 above and that is what kind of duty to avoid religious discrimination did Title VII of the Civil Rights Act of 1964 impose upon TWA. At the time of the acts com-

plained of, 42 U.S.C. § 2000e-2(a)(1) provided, in part, as follows:

> (a) It shall be an unlawful employment practice for an employer:
>
> (1) To fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; . . .

The statute did not provide for any duty on the part of an employer to accommodate the religious needs of employees.

The E.E.O.C. regulation which set out the guidelines on religious discrimination, however, provided as follows:

> (b) The Commission believes that the duty not to discriminate on religious grounds, required by Section 703(a)(1) of the Civil Rights Act of 1964, includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business . . . . [29 C.F.R. § 1605.1(b)].

The question, therefore, becomes whether the E.E.O.C. regulation is a proper interpretation of the Act before it was amended to specifically include a duty to accommodate. TWA cites Dewey v. Reynolds Metals Co., 429 F.2d 324 (6th Cir. 1970), aff'd per curiam by an equally divided court, 402 U.S. 689, 91 S.Ct. 2186, 29 L.Ed.2d 267 (1971), in support of its position that the Act did not impose a duty to accommodate. In *Dewey*, an employee alleged he had been wrongfully discharged from his employment because

of his religious beliefs. The Court of Appeals held that the trial court had erred in applying the regulation, which was not in effect until July 10, 1967, to the activity of the employee, which took place in 1966. The Court, in Riley v. Bendix Corp., 464 F.2d 1113, 1117 (5th Cir. 1972) expressed the view that *Dewey* offers no guidance on the question of whether the regulation was a valid one because it was not in effect when the acts complained of took place. We agree.

We note further, however, that in *Dewey* the employer offered the plaintiff, as well as all other employees, the option of either working on Sunday or finding a replacement. The plaintiff did find replacements for five Sundays and then refused to find others, claiming that this practice was a sin. The Court of Appeals held that even if the 1967 regulation were applied, the employer made a reasonable accommodation by offering the replacement system.

Finally, *Dewey* was based in large part on the final award of a grievance arbitrator under the labor management contract, which has nothing to do with the question at issue here.

In Riley v. Bendix Corp., *supra*, the Court held flatly that the regulation was valid. It relied in part upon the amendment of the Act, which was approved by the Congress on March 8, 1972. Far from holding that that amendment indicates that the legislative intent of the old Act was not to include a duty to accommodate, as TWA argues we should conclude, the Court in *Riley* held the amendment validated and recognized the regulation as a proper interpretation of the old Act.

The amendment to 42 U.S.C. § 2000e(j) is as follows:

> The term "religion" includes all aspects of religious observance and practice, as well as belief unless an employer demonstrates that he is unable to rea-

sonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

The union's brief refers us to Eighth Circuit cases which state broad principles of statutory interpretation to the effect that amendments to statutes passed for the purpose of correcting a judicial interpretation should be applied prospectively only when Congress intended to change the former law as interpreted by the courts. That principle is obviously correct but defendants ignore the legislative history of the amendment at issue in this case.

The legislative history, reported at 118 Congressional Record, §§ 227-253, includes this statement by Senator Randolph of West Virginia, who sponsored the amendment:

> I think in the Civil Rights Act we thus intended to protect the same rights in private employment as the Constitution protects in Federal, State or local governments. Unfortunately, the courts have, in a sense, come down on both sides of the issue. The Supreme Court of the United States, in a case involving the observance of the Sabbath and job discrimination, divided evenly on this question.
>
> This amendment is intended, in good purpose, to resolve by legislation—and in a way I think was originally intended by the Civil Rights Act—that which the courts apparently have not resolved. [118 Congressional Record at § 228]

The measure was passed in the Senate by unanimous vote.

The Chairman of the House Committee made this statement about the amendment:

> The purpose of this subsection is to provide the statutory basis for EEOC to formulate guidelines on discrimination because of religion such as those challenged in Dewey v. Reynolds Metals Company, 429 F.2d 325 [324] (6th Cir. 1970). Affirmed by an equally divided court, 402 U.S. 689 [91 S.Ct. 2186, 29 L.Ed.2d 267] (1971). [118 Congressional Record, pp. 1861-1862]

The measure was also passed in the House by unanimous vote.

We find and conclude that the legislative history of the amendment of the Act, together with the fact that weight should be given to the administrative interpretation of the Act, as reflected by the regulation (see Griggs v. Duke Power Co., 401 U.S. 424, 433, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971)) indicate that regulation 29 C.F.R. § 1605.1(b) was facially valid and is controlling in this case.

We find TWA's argument that the duty to accommodate an employee's religious beliefs is a violation of the Establishment Clause of the First Amendment to be without merit. Defendant TWA correctly states the test for determination of whether a governmental action violates the Establishment Clause as it was set out in Committee for Public Education and Religious Liberty v. Nyquist et al., 413 U.S. 756, 772-773, 93 S.Ct. 2955, 37 L.Ed.2d 948 (1973); (1) that the law must reflect a clearly secular legislative purpose; (2) that the law must have a primary effect that neither advances nor inhibits religion; and (3) that the law must avoid excessive government entanglement with religion. Defendant, however, has not given the Court much guidance as to how the accommodation regulation runs afoul of this test other than arguing that the regulation "clearly places the sanction of law behind religion by facilitating and encouraging employees to take

time off from their jobs for religious observances so that employees with religious beliefs are aided as against non-believers." [Def. TWA Br. pp. 24-25]

It has been well established, however, that not every law that confers an incidental benefit on a religious institution or a person of a particular religion is, for that reason alone, constitutionally invalid. See, e. g., Walz v. Tax Commissioner, 397 U.S. 664, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970), which held that a state could, consistent with the Establishment Clause, choose not to tax church property. Cf. Luetkemeyer v. Kaufmann, 364 F.Supp. 376 (W.D.Mo. 1973).

The duty to accommodate, as stated in 42 U.S.C. § 2000e(j), reflects the general secular legislative purpose of guaranteeing an employee that he will not be discharged from his job merely because of his religion. Consistent therewith, the regulation also imposed a duty to accommodate. The incidental effect of the regulation perhaps indirectly aids religion but its primary effect is to guarantee job security. The purpose and effect of the law as interpreted by the regulation is not primarily to aid religion but to prevent employers from devising means to discriminate which are not facially discriminatory but which do discriminate in effect and intent.

Finally, the regulation does not involve excessive government entanglement with religion. The regulation simply requires the employer to make affirmative efforts to accommodate the employee's religion. No further involvement is necessary than a judgment by the E.E.O.C. or the court that no such accommodation was made. That is not the kind of entanglement contemplated in Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971), and Tilton v. Richardson, 403 U.S. 672, 91 S.Ct. 2091, 29 L.Ed.2d 790 (1971).

We find and conclude, therefore, that the interpretation of Title VII's prohibition of discrimination by reason of religion, as embodied in the E.E.O.C. regulation, 29 C.F.R. § 1605.1(b) does not violate the Establishment Clause of the First Amendment to the Constitution of the United States.

We must now determine whether TWA did in fact take steps to make an accommodation to plaintiff's religious needs. The interpretation of the statute embodied in the regulation requires that the employer show that it was unable to reasonably accommodate the employee's religious observance without undue hardship on the conduct of the employer's business. See, e. g., Riley v. Bendix Corporation, 464 F.2d 1113, 1118 (5th Cir. 1972).

TWA argues that it made three efforts to reasonably accommodate plaintiff's beliefs, that these were not successful from plaintiff's point of view, and that it was unable to make any further efforts. In April, 1968, plaintiff wrote Everett Kussmann, Manager of Stores Systems, asking for Friday sunset to Saturday sunset off (Pl.Ex. 1). In response to that request Kussmann (1) agreed to the union steward seeking to swap or days off; (2) to excuse time off on religious holidays if plaintiff agreed to work on "Christian" holidays if requested; and (3) to attempt to find plaintiff another job (Pl.Ex. 16). On May 7, 1968, the steward reported that he was unable to work out scheduling changes and that he understood that no one was willing to swap days with plaintiff (Pl.Ex. 17). TWA did not take part in the search for employees willing to swap shifts (Tr. 348) and it was admitted at trial that the Union made no real effort (Tr. 346-350). Plaintiff, however, was able for a period of time to work out his day off requirements within the framework of the seniority system (Tr. 214).

On October 4, 1968, plaintiff wrote a letter to Kussmann, informing him that he had worked out his days off requirement by transfer to the 11-7 shift and renewing his request for specific religious holidays off (Pl.Ex. 2). In response, Kussmann reiterated his offer to permit time off on plaintiff's religious holidays whenever possible and requested a list of those holidays (Pl.Ex. 3). On October 20, 1968, plaintiff supplied such a list and expressed his gratitude for Kussmann's "understanding and cooperation" (Pl.Ex. 4).

On December 2, 1968 plaintiff transferred from Building 1, where he had sufficient seniority to maintain a shift in which he could observe his Sabbath, to Building 2, where he was near the bottom of the seniority list and could not be assured a satisfactory shift. His reason for the change was that he was married at that time and a change to Building 2 permitted him to work the day shift and have his evenings free (Tr. 39). On March 7, 1969, a man of less seniority than plaintiff went on vacation and plaintiff was required to work in his position, which required him to work on Saturday (Tr. 39).

Kussmann anticipated difficulties due to the events described above and so arranged a meeting on March 6 with plaintiff and the union steward, James Tinder (Tr. 131). At that meeting Kussmann offered to accommodate plaintiff's religious observance by agreeing to any trade of shifts or change of sections that plaintiff and the union could work out (Tr. 121-132). Any shift or change was impossible within the seniority framework and the union was not willing to violate the seniority provisions set out in the contract to make a shift or change.

TWA claims that any further action on its part would have caused undue hardship to the conduct of its business.

First, had TWA forced another employee to trade shifts or jobs with plaintiff, such action would have violated the seniority provisions of the labor management contract and TWA would have been subjected to personnel problems and grievances (Tr. 157, 193).

Had TWA simply granted plaintiff days off on Saturday it would have left TWA short of help in that position. Plaintiff worked in the Stores Department of TWA's facilities at Kansas City International Airport (KCI). That department is responsible for housing, retaining, and making available parts for use by TWA at its overhaul base at KCI and throughout its system. It operates on a twenty-four hour, seven-day-a-week basis. On weekends TWA worked a minimum number of employees and plaintiff was the only person in his job on his shift during the weekends. To leave that position empty would have impaired the supplying of parts for essential airline operations (Tr. 220, 221, 264, 265, 286, 360, 361). To fill plaintiff's position with someone from another area would deprive that area of its regular manpower (Tr. 221, 262, 293, 294, 362). To bring in a man not working on that day would force TWA to pay premium wages for the time he filled in for plaintiff (Tr. 221, 263, 294).

TWA argues also that if all employees were treated uniformly as to their religious beliefs and observances, it could be very difficult to perform seven-day-a-week airline operations.

We find and conclude that TWA's actions with respect to working out plaintiff's religious observance was a reasonable accommodation by TWA and that any further action by TWA would have worked an undue hardship on the conduct of its business. The duty to accommodate does not require that an employer make every effort short of going out of business to permit his employees to stay on

the job and also to observe their religion. The term "*reasonable* accommodation" (emphasis added) should be read with the term "undue hardship" to arrive at the proper standard.

The duty imposed on an employer by Title VII is not a duty to impose hardships on the rest of his employees or members to accommodate the religious beliefs of a few. It is simply a duty to take affirmative action to try to find a way to permit the employee to observe his religion as he wishes, as opposed to a duty simply not to intentionally discriminate. A study of a very few cases that have decided the question of whether an employer has made a reasonable accommodation does not contradict that construction.

In Jackson v. Veri-Fresh Poultry, Inc., 304 F.Supp. 1276 (E.D.La.1969), plaintiff, a Seventh Day Adventist, was discharged from her position as a chicken picker when she advised the company that she would be unable to work between 5.00 p. m. Friday and 5:00 p. m. Saturday because of the requirements of her religion. There was no evidence that the company made any effort to accommodate her or that it would suffer undue hardship if it did not permit her the time off she requested. The company simply advised her that if she would not work company hours, she would be discharged. The Court found for plaintiff and ordered that she receive back pay

In Riley v. Bendix Corp., 464 F.2d 1113 (5th Cir. 1972), the Circuit Court of Appeals for the Fifth Circuit reversed the decision by the district court, reported at 330 F.Supp. 583 (M.D.Fla.1971), that plaintiff was not entitled to relief because there was no intentional discrimination on the part of the company. The Court of Appeals held that the E.E.O.C. regulation was a valid interpretation of the Act

and that, therefore, the company had the burden of proving that it had attempted to make reasonable accommodations. The Court found no evidence on the record that the employer was unable to reasonably accommodate Riley's religious observance or practice without undue hardship on the employer's business.

In Reid v. Memphis Publishing Co., 468 F.2d 346 (6th Cir. 1972), the Court of Appeals for the Sixth Circuit reversed the decision by the district court that an employer had no duty to accommodate an employee's religious belief. The Court remanded the case with instructions that the trial court consider evidence on the issue of whether the employer could reasonably accommodate plaintiff's religion without undue hardship.

On remand the district court in Reid v. Memphis Publishing Co., 369 F.Supp. 684 (W.D.Tenn.1973) found that the employer had not offered any accommodation to the plaintiff and that no undue hardship would result in permitting the plaintiff, a Seventh Day Adventist, and a copy-reader for the defendant, to have Saturday off. Specifically, the court found that the newspaper had other copy-readers who could take plaintiff's place, that the newspaper's evidence concerning scheduling difficulties, morale problems, and financial burden was not sufficient to show undue hardship. The evidence on undue hardship, the court stated, was not specific and not of the requisite strength to sustain the employer's burden of proof.

In Claybaugh v. Pacific Northwest Bell Telephone Co., 355 F.Supp. 1 (D.Or.1973), the plaintiff was discharged from his job at one of Bell's operations that had a round-the-clock, seven-days-a-week schedule after he joined the Seventh Day Adventist Church and refused to work on his Sabbath, Saturday. The evidence showed that the em-

ployer would encounter difficulties in permanently changing plaintiff's schedule to meet his demands. The court found, however, that the employer had made absolutely no affirmative effort to accommodate plaintiff's religious observance. The company did not try to temporarily accommodate plaintiff, which it was clearly able to do, while attempting to find a permanent solution. It did not look for a possible trade with another employee nor an open position into which plaintiff could move to avoid the conflict with his religious beliefs. The court concluded that Bell had not made a reasonable accommodation.

In none of the cases cited did the employer show that it had taken affirmative action on behalf of the employee. In this case, and in sharp contrast, TWA established as a matter of fact that it did take appropriate action to accommodate as required by Title VII. It held several meetings with plaintiff in which it attempted to find a solution to plaintiff's problems. It did accommodate plaintiff's observance of his special religious holidays. It authorized the union steward to search for someone who would swap shifts, which apparently was normal procedure (Tr. 349). Witnesses for TWA testified that they attempted to work out plaintiff's problems in ways that had proved successful in similar cases (Tr. 305).

TWA would not have been placed in a position where it could not work out plaintiff's problem had plaintiff, to suit his own convenience, not transferred to Building 2 where he had insufficient seniority to bid on a suitable shift. That factor, however, should be viewed as a frustration of TWA's attempts to accommodate, and not as an action which relieved TWA of the duty to accommodate, as TWA argues.

We find and conclude that further accommodation by TWA would have worked an undue hardship on the con-

duct of its business. TWA had two choices for further accommodation: (1) to simply allow plaintiff to take his time off and attempt to replace him; or (2) to force another employee to change shifts.

TWA runs a twenty-four-hour-a-day, seven-days-a-week operation. Plaintiff performed an important job for TWA and was the only person performing his particular job on his shift during the weekend. To replace him with an employee from another area would leave that employee's work crew short. To replace him with an employee who was not regularly scheduled to work at that time would have caused TWA to pay premium wages. Both of these solutions would have created an undue burden on the conduct of TWA's business. Title VII cannot be interpreted to require that companies finance employee's religious beliefs.

TWA is a party to a labor-management contract which clearly sets out a seniority provision which is binding on the company and on the union (Article VI(b), Pl.Ex. 30) With respect to any asserted duty on the part of TWA to change plaintiff's shift in violation of the seniority provisions of the labor-management contract, the same considerations apply here as applied with respect to the union. Title VII does not force TWA to impose upon other employees because of one employee's religious belief. TWA's business includes the administration of its many employees and to impose hardships upon them imposes hardships upon the company's business. We find and conclude, therefore, that it would have been an undue hardship for TWA to have changed plaintiff's shift in violation of the seniority provision of the labor-management contract.

Finally, we again make reference to the seniority provisions of Title VII, 42 U.S.C. § 2000e-2(h), which ex-

empts different treatment to different employees based upon a bona fide seniority system from the other provisions of § 2000e-2 That section, as we stated in reference to the union's duty to accommodate, indicates that Congress did not intend that unions or employers be required to take actions that would impinge upon bona fide seniority systems.

For the reasons stated, we find and conclude that neither TWA nor any of the three unions violated Title VII of the Civil Rights Act of 1964 by reason of its discharge of plaintiff for his refusal to work on his Sabbath. Accordingly, it is

Ordered that the Clerk of the Court enter judgment for defendants.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 74-1424

Larry G. Hardison,
Appellant,

v.

Trans World Airlines, Inc., International Ass'n of Machinists and Aero Space Workers, International Ass'n of Machinists and Aero Space Workers, District 142, and International Ass'n of Machinists and Aero Space Workers, Local 1650,
Appellees.

Appeal from the United States District Court for the Western District of Missouri.

Submitted: December 10, 1974
Filed: December 16, 1975

Before LAY, BRIGHT and WEBSTER, Circuit Judges.

WEBSTER, Circuit Judge.

This appeal presents for our review important questions concerning the requirements of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*, and the guidelines on religious discrimination promulgated thereunder, 29 C.F.R. §1605 (1974). Larry G. Hardison, a member

of the Worldwide Church of God, initiated this employment discrimination case against his union and his employer following his discharge as a Trans World Airlines (TWA) stores clerk for alleged insubordination. The factual background of this litigation is not disputed, and, in summarizing the relevant details, we rely heavily upon the findings of the District Court,[1] reported in *Hardison v. Trans World Airlines*, 375 F. Supp. 877 (W.D. Mo. 1974).

Hardison's job was covered by a collective bargaining agreement negotiated with TWA by the International Association of Machinists and Aero Space Workers, The International Association of Machinists and Aero Space Workers, District 142, and the International Association of Machinists and Aero Space Workers, Local 1650, all defendants below.[2] That agreement contained seniority provisions relating, *inter alia*, to days off and vacations.

The Stores Department at the Kansas City International Airport, in which Hardison had worked from June 5, 1967 until his discharge on April 2, 1969, operates twenty-four hours per day, seven days per week. Hardison initially worked as a stores clerk in Building No. 1, performing work which was essential to TWA's operation but not unique. In the spring of 1968, Hardison began studying the teachings of the Worldwide Church of God. That religion requires its members to refrain from all work on certain designated holidays as well as on its Sabbath, which occurs each week from sundown on Friday to sundown on Saturday. Hardison discussed his religious studies with Everett Kussman, the Manager of the Stores System, who notified a TWA supervisor by memo as follows:

1. Agreed to Steward seeking swap of days off

2. Agreed to odd holidays (excused T.O.) *if* he works the 'Christian' holidays when requested.

3. He advises you are getting him another job—agreed *you should*. Belongs to the 'World Wide Christian Church' Garner Ted Armstrong Ambassador College Pasadena Calif

Soon thereafter, the supervisor notified Kussman that he had been unable to make any "headway" in trying to resolve the problem. Hardison continued to work on Friday evenings and Saturdays, including some voluntary over-time work. On October 4, 1968, Hardison wrote Kussman that he had transferred to the 11:00 p.m. to 7:00 a.m. shift as a result of which he would be able to observe the Sabbath and would soon formally enter the Worldwide Church of God. He reminded Kussman of his assurance that Hardison would be excused from work on certain holidays under those circumstances. Subsequently, he furnished Kussman at his request a list of religious holidays and dates thereof.

On December 2, 1968, Hardison bid for a position as a stores clerk in another section in Building 2 in order to obtain a day shift position. Hardison indicated that his reason for transferring to the Building No. 2 section was his recent marriage: he felt day work would be more compatible with married life. Each of these stores clerk sections was governed by a separate seniority list. Thus, although Hardison had relatively high seniority in Building No. 1, he had the second lowest seniority position in

---

1. The Honorable John W. Oliver, United States District Court for the Western District of Missouri.

2. While distinctions between the local, district, and international unions are made by appellees in this appeal, our holding makes it unnecessary to take account of such distinctions, and the unions are sometimes for convenience collectively referred to herein as "the union".

Building No. 2. As a result, his ability to select days off was considerably diminished.

In March, 1969, Bill Wyatt, the man on the bottom of the seniority list in the Building No. 2 section, went on vacation. Hardison was called to substitute for Wyatt, whose work schedule included Friday evenings and Saturdays. On March 6, 1969, Hardison met with Kussman and James Tinder, a union steward, to discuss the conflict between this schedule and Hardison's religious practices. Several possible adjustments were explored,[3] but since all required Hardison to do some work on the first Saturday, March 8, none of these adjustments were instituted. Hardison did not file a grievance concerning this unsatisfactory resolution although he knew he had a right to do so.

Hardison did not report for work on Saturday, March 8, informing the storekeeper that he had personal business to do. Hardison was likewise absent from work on the following two Saturdays, March 15 and March 22. He was then notified that a discharge hearing had been scheduled. Prior to that hearing, Hardison met with Local 1650's grievance committee. Various avenues of legal redress and defenses were discussed, and it was decided that the best approach would be a plea for leniency coupled with an effort to obtain reversal at a higher lever in the event of an adverse result. The possibility that the union might waive its seniority rules to permit Hardison to work on a different shift was not discussed. Following the meeting, Hardison voluntarily changed his shift to the "twilight shift" (3:00 p.m. to 11:00 p.m.) in an effort to resolve the problem. When Hardison left work early (at sundown) on Friday, March 28, however, it became ap-

3. These included such possibilities as changing Hardison's shift, changing his job, or permitting him to work four days per week rather than five.

parent that this change in schedule would not obviate future problems as Local 1650 had hoped.

The discharge hearing was held on March 31, 1969, before TWA representative J. H. Frey. Although Local 1650 argued that termination was too severe a penalty, Hardison was found guilty of insubordination and discharged on April 2, 1969. Thereafter, both Local 1650 and District 142 attempted to contact Hardison about pursuing the matter further, but upon receiving no cooperation from Hardison, they dropped the case.

Hardison filed an unlawful employment practice charge with the Equal Employment Opportunity Commission which deferred to the Missouri Commission on Human Rights. On February 10, 1972, after all administrative procedures had been exhausted, Hardison filed suit against TWA and the three unions in United States District Court pursuant to 42 U.S.C. §2000e-2.[4] He contended that all the defendants had practiced religious discrimination and, in addition, that the unions had violated their duty of fair representation. Following a trial to the court on primarily stipulated facts, judgment was entered for all defendants on the ground that each had attempted a reasonable accommodation of plaintiff's religious needs, as required by the controlling statutes and guidelines, and that undue hardships would have resulted from any greater efforts. *Hardison* v. *Trans World Airlines, supra.*

In essence, the decision below held that the valid seniority provisions of the unions' collective bargaining agreement with TWA did not permit further accommodation by any of the defendants. Hardison appeals, contending that the District Court's findings of reasonable accommodation and potential undue hardship were clearly

4. Federal jurisdiction was established below under 42 U.S.C. §2000e-5 and is not challenged on appeal.

erroneous. Separate briefs have been filed by Hardison, the unions, TWA, and by two amici curiae seeking reversal, the Equal Employment Opportunity Commission and COLPA (National Jewish Commission on Law and Public Affairs).

The issues before us include the alleged unconstitutionality of Title VII and the guidelines on religious discrimination, the extent of the unions' duty of fair representation under the circumstances presented, and whether the findings below that the defendants had fulfilled their respective duties to attempt a reasonable accommodation, short of undue hardship, of Hardison's religious practices were clearly erroneous.

I

STATUTORY AND REGULATORY FRAMEWORK

Our review must necessarily begin with an examination of the controlling statutes and regulations.

The Civil Rights Act of 1964 specifically forbids employers from practicing religious discrimination in specifically enumerated ways.

42 U.S.C. §2000e-2(a) provides in part:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;
> * * *

42 U.S.C. §2000e-2(c) provides:

> It shall be unlawful employment practice for a labor organization—
>
> (1) to exclude or expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;
>
> (2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

The EEOC is empowered to promulgate regulations in aid of the statute. 42 U.S.C. §2000e-12(a). The original guidelines provided:

> However, the Commission believes that an employer is free under Title VII to establish a normal work week (including paid holidays) generally applicable to all employees, notwithstanding that this schedule may not operate with uniformity in its effect upon the religious observances of his employees. For example, an employer who is closed for business on Sunday does not discriminate merely because he requires that all his employees be available for work on Saturday.

29 C.F.R. §1605.1(a)(3), 31 Fed. Reg. 8370 (1966). The regulations were modified in 1967 to provide:

> The Commission believes that the duty not to discriminate on religious grounds, required by section 703(a)(1) of the Civil Rights Act of 1964, includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business. Such undue hardship, for example, may exist where the employee's needed work cannot be performed by another employee of substantially similar qualifications during the period of absence of the Sabbath observer.

29 C.F.R. §1605.1(b), 32 Fed. Reg. 10298 (1967). The EEOC further placed upon the employer "the burden of proving that an undue hardship renders the required accommodations to the religious needs of the employee unreasonable." 29 C.F.R. §1605.1(c), 32 Fed. Reg. 10298 (1967).

The possibility that the revised regulations might impose a burden (to accommodate) not contemplated by the statute which posed "grave constitutional questions" of violation of the Establishment Clause of the First Amendment was raised in dicta in *Dewey* v. *Reynolds Metals Co.*, 429 F.2d 324, 334 (6th Cir. 1970), affirmed by an equally divided Court, 402 U.S. 689 (1971). *Dewey* also concluded that Title VII only prohibited acts taken with intent to discriminate. This conclusion was rejected by the Supreme Court in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971).

In 1972, Congress incorporated the substance of 29 C.F.R. §1605.1(b) into the Act by defining "religion" as follows:

> The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

42 U.S.C. §2000e(j).

This amendment has been held to have eliminated all doubt that the guideline at 29 C.F.R. §1605.1 reflects the will of Congress. *Reid* v. *Memphis Publishing Co.*, 468 F.2d 346, 351 (6th Cir. 1972);[5] *Riley* v. *Bendix Corp.*, 464 F.2d 1113, 1116-17 (5th Cir. 1972). The District Court likewise so held, and we agree.

TWA LIABILITY

29 C.F.R. §1605.1, which we hold to be consistent with the statute, defines the parameters of the employer's duty. The company may not accept the role of a Pontius Pilate.[6] An effort to accommodate the employee's religious observances must be made. Such accommodation need only be a reasonable one. An accommodation alternative which imposes undue hardship upon the employer's business is unreasonable and not required. The burden of demonstrating its inability to reasonably accommodate falls upon the employer.

The record reflects a consistent effort by Hardison to acquaint TWA with his religious conversion and the effect of that commitment upon his ability to work during his

---

5. In a second appeal, a different panel of the Sixth Circuit (Edwards, J., dissenting) seems to have receded from its prior holding that the regulation was consistent with the statute. *Reid* v. *Memphis Publishing Co.*, 521 F.2d 512 (6th Cir. 1975). We are more persuaded by the earlier opinion and by Judge Edwards' dissent.

6. Matthew 27:24.

Sabbath period and certain other religious holidays. He made no demands which were not consistent with his known religious beliefs. He was willing to work long weeks or short weeks provided his religious obligation to abstain from work on his Sabbath could be met. He even transferred to the twilight shift in order to minimize the impact of his absence on the company.

We cannot agree with the company's contention, apparently accepted by the District Court, 375 F. Supp. at 891, that Hardison's transfer from Building No. 1 to Building No. 2 was evidence of a lack of cooperation on his part. The implication is that if Hardison had not transferred he would have retained enough seniority in Building No. 1 to protect himself against Sabbath day assignments. This is not accommodation. To limit Hardison's right of transfer within the company as a condition of accommodation would be "to discriminate against [him] with respect to his * * * conditions, or privileges of employment, because of [his] * * * religion * * *." 42 U.S.C. §2000e-2(a)(1). The purpose of this transfer was to obtain a daytime shift, Hardison having recently married. While the regulation implies that the employee must be responsive to a reasonable accommodation, no such accommodation was ever offered by TWA, which at all times contended that it was precluded from accommodating Hardison's Sabbath observance by the collective bargaining agreement. Before an employer can assert the defense of non-cooperation, it is incumbent upon it to establish the accommodation which it has tendered and with which the employee refused to cooperate. *See Riley* v. *Bendix Corp., supra; Claybaugh* v. *Pacific Northwest Bell Telephone Co.*, 355 F. Supp. 1, 4-6 (D. Ore. 1973) (Employer should have attempted a temporary accommodation in view of its large work force).

Hardison's job assignment in Building No. 2 was to pick up or deliver parts needed by mechanics working in the building. He was to "run the train", that is, to continually make the rounds of the shops in the building. He was part of a work force of 38 to 40 people, although he would be the only person running the train during his particular shift on the weekend. TWA conceded that there were over 200 available employees who were capable of performing Hardison's work.

The District Court concluded that TWA had made a reasonable effort to accommodate Hardison's religious beliefs and that the alternatives rejected by TWA would have created an undue burden on TWA's business. Upon a full review of the record, we must respectfully disagree with both conclusions.

Alternatives Rejected

(1) Within the framework of the collective bargaining agreement, TWA could have permitted Hardison to work a four-day week. Hardison was willing to do this,[7] but the company would not agree because it would be shorthanded during one shift. It conceded that a supervisor could be utilized or another worker on duty elsewhere could be transfered, but urged that this would cause some other shop function to suffer. Similar arguments have been rejected by the Equal Employment Opportunity Commission. E.E.O.C. Decision No. 70-580 (March 2, 1970), 2 FEP Cases 516, 1973 CCH EEOC Decisions ¶6120; E.E.O.C. Decision No. 70-110 (Aug. 27, 1969), 2 FEP Cases 225, 1973 CCH EEOC Decisions ¶6062.

In determining whether a possible accommodation would result in undue hardship or mere inconvenience, we

7. Hardison was also willing to work a six-day week but this solution was in apparent violation of the 40 hour per week clause of the contract.

must look to the facts of each case. The burden of demonstrating undue hardship is upon the employer. In this case, the company contends that a short week for one man during the temporary period of Wyatt's vacation would have hampered its operations. Two company witnesses expressed such an opinion without any further evidence or factual support. We think the District Court erroneously drew an inference of undue hardship from such testimony. The actual hours involved in this case did not even amount to a full shift, since Hardison had transferred to the twilight shift and would have worked from 3:00 p.m. on Friday until sundown (approximately 6:30 p.m.), thus further reducing the impact upon the company's operations. Balanced against the interests to be protected by §2000e, we cannot say such an accommodation would result in an undue hardship to the employer.[8]

(2) Another alternative within the framework of the collective bargaining agreement was for TWA to fill Hardison's Sabbath shift from other available personnel. This could be accomplished by holding a worker over from the last shift, calling a worker in early, or, more logically, assigning a worker from the pool of 200 employees qualified to do the work. TWA contended that this alternative

8. Cases cited by TWA are readily distinguishable. They deal with situations where the work force available to accommodate the complaining employee's needs was small, *see, e.g.*, *Johnson* v. *United States Postal Service*, 364 F. Supp. 37 (N.D. Fla. 1973), *aff'd*, 497 F.2d 128 (5th Cir. 1974); *Drum* v. *Ware*, ... F. Supp. ....., 7 FEP Cases 269, 7 EPD ¶9244 (W.D. N.C. 1974); or where the employer presented no evidence to support its claim that it reasonably accommodated its employee's needs, *see, e.g.*, *Riley* v. *Bendix Corp.*, 464 F.2d 1113 (5th Cir. 1972), or that it would suffer undue hardship, *see, e.g.*, *Jackson* v. *Veri Fresh Poultry, Inc.*, 304 F. Supp. 1276 (E.D. La. 1969). Moreover, we think a totality of the circumstances approach must reject unproven assumptions that the company will be inundated with similar demands. That approach would be more persuasive at a point in time when the hardship was in fact evident and was manifestly undue. Hardison's request was the first of its kind which TWA's witnesses could recall.

would be an undue hardship because such workers must be paid overtime compensation. The District Court said, "The duty to accommodate does not require that an employer make every effort short of going out of business to permit his employees to s[t]ay on the job and also to observe their religion", 375 F. Supp. at 889, and that "Title VII cannot be interpreted to require that companies finance employee's religious beliefs." 375 F. Supp. at 891. These general statements, while arguably correct, may tend to distort the actual hardship which overtime payments would have imposed upon TWA to fill Hardison's Sabbath shift under the facts of this case. The regulation does not preclude some cost to the employer anymore than it precludes some degree of inconvenience to effect a reasonable accommodation. *Cf. Ward* v. *Allegheny Ludlum Steel Corp.*, 397 F. Supp. 375, 377 (W.D. Pa. 1975). The regulation expressly casts upon the employer the burden of proving undue hardship upon its business. Each case must stand upon its own facts. The actual cost of accommodation by filling Hardison's Sabbath shift from available personnel is not clear from the record. We do know that in this case the cost would have ended upon Wyatt's return from his vacation.[9] The company might well have concluded that the additional expense was preferable to getting along with one less man on the shift or suffering the administrative inconvenience of seeking a swap for Hardison. It does not appear from the record, however, that TWA gave any serious consideration to the reasonableness of such an alternative or to the extent of the burden it might create upon the business of TWA. We cannot say that its burden of proof has been met in this case.

9. It should also be obvious that neither Hardison nor his religion would have benefited financially from such an accommodation.

(3) A third alternative considered was a swap between Hardison and another employee, either for another shift or for the Sabbath days.[10] While both TWA and the union indicated no opposition to a voluntary swap, the acquiescence was clearly couched in terms of the limitations imposed by Article VI, the seniority clause of the collective bargaining agreement:

> (b) The principle of seniority shall apply in the application of this Agreement in all reductions or increases of force, preference of shift assignment, vacation period selection, in bidding for vacancies or new jobs, and in all promotions, demotions, or transfers involving classifications covered by this Agreement.

The company relied upon the union steward to handle the details. Every swap was technically at risk because the exchange was subject to the right of a senior worker to bump into the opening. Thus, the company and the union contended that they could not individually or jointly act to make a job exchange which would accommodate Hardison's religious need to be free of servile work on his Sabbath.

The proper relationship between a bona fide seniority system and the requirement of reasonable accommodation under 29 C.F.R. §1605.1 has not yet been settled by the

10. TWA had earlier agreed to a "swap" on Hardison's religious holidays provided Hardison was willing to work an equal number of "Christian" holidays and another employee was willing to trade with Hardison. None of the holidays (as distinguished from Sabbath days) had fallen on Hardison's shift prior to his discharge, and we are not concerned with whether TWA's posture with respect to such religious holidays was a reasonable accommodation. We note, however, that the undertaking was to permit a swap, not to find one or obtain union approval.

Supreme Court.[11] The Equal Employment Opportunity Commission has taken the position that when the inflexibility of a collective bargaining agreement is raised as a defense to charges of religious discrimination, that inflexibility must be justified by substantial business necessity. E.E.O.C. Decision No. 73-0314 (Aug. 31, 1972), 1973 CCH EEOC Decisions ¶6379; E.E.O.C. Decision No. 72-2066 (June 22 1972), 4 FEP Cases 1063, 1973 CCH EEOC Decisions ¶6367. At least one court has directed that an article in a collective bargaining agreement which would have required an employee to work occasional Saturdays in violation of his religious beliefs not be applied to such employee. *Drum* v. *Ware*, ... F. Supp. ....., 7 FEP Cases 269, 7 EPD ¶9244 (W.D. N.C. 1974). *But see Dawson* v. *Mizell*, 325 F. Supp. 511 (E.D. Va. 1971). It would seem that a collective bargaining agreement, the seniority provisions of which preclude *any* reasonable accommodation for religious observances by employees, is prima facie evidence of union and employer culpability under the Act.[21] We are not required to reach that point in this case, however, because the evidence is clear that

11. 42 U.S.C. §2000e-2(h) provides in part:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply * * * different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system * * * provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin. * * *

12. If Saturday work inevitably falls to the employees with lowest seniority, one may well ask whether such seniority provisions would not effectively preclude TWA from ever hiring those Seventh Day Adventists, Orthodox Jews, and members of the Worldwide Church of God whose religious convictions preclude work from sundown on Friday until sundown on Saturday. It is no answer to such a person, or to the statute itself, that if he compromises his religious beliefs for a time he may develop enough seniority to practice them again.

TWA did not seek and the union therefore did not refuse to entertain a possible variance.[13]

TWA did not even seek to find volunteers within the seniority system. It left that task to the union steward, who likewise did nothing. The matter was not referred to the Union Relief Committee, an informal organization of union members through which the union and TWA were normally able to avoid confrontations over seniority variances in special situations. This was the first Sabbath request which TWA and the union had received at the Kansas City operation. While company officials testified of their concern that giving Hardison a variance would irritate other union members, we find no evidence to support such an inference, nor are we convinced that such irritation, if real, would have been an undue hardship on the employer's business. *See Cummins* v. *Parker Seal Co.*, 516 F.2d 544 (6th Cir. 1975). *See generally,* Annot., 22 A.L.R. Fed. 580 (1975).

III

UNION LIABILITY

The District Court rejected the union's contention that the duty of accommodation falls only upon the employer and not upon the union. Judge Oliver observed:

> The language of the regulation does speak in terms of the employer but so have other provisions and

13. In *Shaffield* v. *Northrop Worldwide Aircraft Services, Inc.*, 373 F. Supp. 937 (M.D. Ala. 1974), a collective bargaining agreement which contained a seniority provision also contained a provision that "seniority cannot be the sole determining factor in making shift assignments." The court held that failure of the employer to seek a variance to permit the employee, a Seventh Day Adventist, to transfer to a position which would avoid his working on his Sabbath was a violation of Title VII. *But see Kettell* v. *Johnson & Johnson*, 337 F. Supp. 892 (E.D. Ark. 1972), decided prior to the 1972 Amendment to Title VII which makes clear that failure to make affirmative accommodation must be justified by the employer.

> regulations pursuant to the Act, which have been interpreted to include the union. For example, 42 U.S.C. §2000e-2(h), the provision on seniority systems discussed below has been applied to unions. See, e.g., Local 189, United Papermakers and Paperworkers v. United States, 416 F.2d 980 (5th Cir. 1969).
>
> Furthermore, this case is a perfect example of a situation in which a union could accommodate a member if required to do so. TWA agreed that plaintiff could change shifts if the union approved. Such approval would mean that the union would have to suspend the operation of the seniority rules in plaintiff's case. Had the union made this accommodation, plaintiff would have been able to observe his Sabbath as he wished.

375 F. Supp. at 882. We agreed with Judge Oliver's analysis and conclusion that in a proper case a union may be held to a duty of reasonable accommodation as well as the employer. This conclusion is consistent with the provisions of 42 U.S.C. §2000e-2(c), which declare it to be an unlawful employment practice for a union "to cause or attempt to cause an employer to discriminate against an individual in violation of this section." Thus, the union may be held liable if it purposefully acts or refuses to act in a manner which prevents or obstructs a reasonable accommodation by the employer so as to cause the employer to discriminate.

The District Court next considered the union's duty in light of its existing contract. Finding the seniority provisions of the contract to be facially neutral, the District Court held it to be "coincidental" that as to Hardison "the seniority system acted to compound his problems in exercising his religion." 375 F. Supp. at 883. The Dis-

trict Court further found that the union's duty to accommodate in this case "did not require the union to ignore its seniority system" and that the efforts of the union in behalf of Hardison did not violate its duty of fair representation. 375 F. Supp. at 883-85.

These conclusions are not directly challenged upon appeal, and the briefs and oral argument are directed to the breach of duty by TWA. We are thus not required to reach the substantive correctness of such conclusions. *Twin City Federal Savings & Loan Association* v. *Transamerica Insurance Co.*, 491 F.2d 1122, 1127 (8th Cir. 1974); *Mississippi River Corp.* v. *Federal Trade Commission*, 454 F.2d 1083, 1093 (8th Cir. 1972). We reserve for future cases the effect of a union's refusal to modify its employee seniority rights when no other accommodation can be accomplished without undue hardship to the employer's business. *See Robinson* v. *Lorillard Corp.*, 444 F.2d 791 (4th Cir.), *petition for cert. dismissed*, 404 U.S. 1006 (1971).[14] At this point, no hard rules seem possible; the balancing of important competing interests must be done on a case by case basis.

---

14. In *Robinson* v. *Lorillard Corp.*, 444 F.2d 791, 799 (4th Cir.), *petition for cert. dismissed*, 404 U.S. 1006 (1971), the Fourth Circuit held:

> Avoidance of union pressure also fails to constitute a legitimate business purpose which can override the adverse racial impact of an otherwise unlawful employment practice. The rights assured by Title VII are not rights which can be bargained away—either by a union, by an employer, or by both acting in concert. Title VII requires that both union and employer represent and protect the best interests of minority employees. Despite the fact that a strike over a contract provision may impose economic costs, if a discriminatory contract provision is acceded to the bargainee as well as the bargainor will be held liable. [footnote omitted]

IV

CONSTITUTIONAL CLAIM

Since we conclude that TWA violated its duty of accommodation, we must reach its constitutional claim that Ttile VII violates the Establishment Clause of the First Amendment by requiring an accommodation. TWA contends that the statute is not neutral as between groups of religious believers and nonbelievers. *See School District of Abington Township* v. *Schempp*, 374 U.S. 203 (1963); *Everson* v. *Board of Education*, 330 U.S. 1 (1947). The view that it is constitutionally impermissible for a government to enforce accommodation of religious beliefs in a manner which results in privileges not available to a nonbeliever, or which result in inconvenience to the nonbeliever, is not without articulate support. *See* Edwards and Kaplan, *Religious Discrimination and the Role of Arbitration Under Title VII*, 69 Mich. L. Rev. 599, 628 (1971). *But see* Comment, *Religious Observance and Discrimination in Employment*, 22 Syracuse L. Rev. 1019 (1971).

The District Court, however, found this constitutional attack upon the statute and guidelines to be without merit. It first applied the three-fold test set forth in *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U.S. 756, 772-73 (1973): (1) the law must reflect a clearly secular purpose; (2) it must have a primary effect that neither advances nor inhibits religion; and (3) it must avoid excessive government entanglement with religion. The District Court stated:

> The duty to accommodate, as stated in 42 U.S.C. ¶2000e(j), reflects the general secular legislative purpose of guaranteeing an employee that he will not be discharged from his job merely because of his religion. Consistent therewith, the regulation also im-

poses a duty to accommodate. The incidental effect of the regulation perhaps indirectly aids religion but its primary effect is to guarantee job security. The purpose and effect of the law as interpreted by the regulation is not primarily to aid religion but to prevent employers from devising means to discriminate which are not facially discriminatory but which do discriminate in effect and intent.

Finally, the regulation does not involve excessive government entanglement with religion. The regulation simply requires the employer to make affirmative efforts to accommodate the employee's religion. No further involvement is necessary than a judgment by the E.E.O.C. or the court that no such accommodation was made. That is not the kind of entanglement contemplated in Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971), and Tilton v. Richardson, 403 U.S. 672, 91 S.Ct. 2091, 29 L.Ed.2d 790 (1971).

375 F. Supp. at 888.

The same constitutional argument was recently raised in *Cummins* v. *Parker Seal Co., supra,* and similarly rejected. The Sixth Circuit held that both the statute and the regulation met the three-fold test of *Nyquist.* The purpose of the statute, it observed, was "to prevent discrimination in employment." *Id.* at 552. This purpose, it noted, was upheld against constitutional challenge in *Griggs* v. *Duke Power Co., supra,* which dealt with racial discrimination. It found further support in the reasoning of the Supreme Court in *Gillette* v. *United States,* 401 U.S. 437 (1971), wherein draft exemptions for conscientious objectors were upheld, not only upon pragmatic grounds but also because a valid state interest lay in the promotion

of conscientious action thought to be important in a democratic society. The Sixth Circuit noted that neither the statute nor the regulation advanced religion; no financial support was mandated for religious institutions. *See Lemon* v. *Kurtzman,* 403 U.S. 602, 612 (1971); *Walz* v. *Tax Commission,* 397 U.S. 664, 668 (1970). Finally, it noted that the mere requirement of reasonable accommodation involved far less government entanglement with religion than the Sunday closing laws sanctioned by *McGowan* v. *Maryland,* 366 U.S. 420 (1961). We find this reasoning persuasive, and we agree with the District Court's conclusion that the constitutional challenge must be rejected.

V

CONCLUSION

We affirm the entry of judgment in favor of defendant unions. Since we hold that TWA engaged in religious discrimination by breach of its duty to make a reasonable accommodation to the religious needs of Hardison through affirmative action, we reverse the judgment in favor of TWA and remand the case to the District Court for a determination of appropriate relief under 42 U.S.C. §§2000e-5(g) and 2000e-5(k).

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 74-1424
September Term, 1975

Larry G. Hardison,
Appellant,

vs.

Trans World Airlines, Inc., International Association of Machinist & Aerospace Workers,
International Assoc. of Machinists & Aerospace Workers, Dist. 142, and
International Assoc. of Machinists & Aerospace Workers, Local 1650,
Appellees.

Appeal from the United States District Court for the Western District of Missouri

---

On motion of Appellee, Trans World Airlines, Inc., it is now here ordered that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from this date. If within that time there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari has been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

January 19, 1976

UNITED STATES COURT OF APPEALS
For the Eighth Circuit
St. Louis, Mo. 63101
January 15, 1976

Robert C. Tucker, Clerk

Hon. Michael Rodak, Jr., Clerk
Supreme Court of the United States
Supreme Court Building
Washington, D.C.

Re: No. 74-1424. Larry Hardison v. Trans World Airlines

Dear Sir:

Pursuant to request of Mr. George Feldmiller, Stinson, Mag, Thomson, McEvers & Fizzell, TenMain Center, Kansas City, Missouri we have prepared and are enclosing the two-volume certified transcript of record in the above case for use in the Supreme Court in connection with an application for writ of certiorari. The certified record consists of one volume of Appendix and one volume of the Proceedings in this Court.

Very truly yours,

Robert C. Tucker
Clerk

dw
enc
Copy
Hon. Robert H. Bork
Solicitor General
Mr. William H. Pickett
801 Traders Natl. Bank Bldg.
1125 Grand Avenue
Kansas City, Missouri

APPENDIX C

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
911 Walnut Street—Room 500
Kansas City, Missouri 64106

FIELD DIRECTOR'S FINDINGS OF FACT
Case No. YKC1 236
(TKCO 0061)

In Re:

Larry G. Hardison
Charging Party

vs.

Trans World Airlines, Inc.
Kansas City, Missouri
and
International Association of Machinists
and Aero Space Workers
Kansas City, Missouri
Respondents

Date of alleged violation: April 2, 1969

Date of filing of charge: October 28, 1969

Dates of service of charge: October 1, 1970 (Employer)
January 27 & 29 1971 (Union)

SUMMARY OF CHARGE

Charging Party alleges Respondent employer and Respondent union engaged in unlawful employment practices in violation of Ttitle VII of the Civil Rights Act of 1964, by discriminating against him with respect to the terms, conditions and privileges of his employment and resulting discharge because of his religion (Worldwide Church of God).

JURISDICTION

Respondent employer is engaged in interstate air transportation.

Respondent employer employs approximately five thousand employees at its overhaul base, situs of the charge.

Respondent union is one of the bargaining representatives for Respondent employer's employees and is a labor organization within the meaning of Section 701 (d) and (e) of the Act. It is represented at the situs by Local 1650 and by District 142, International Association of Machinists and Aero Space Workers.

The Commission received the charge on August 25, 1969, and deferred to the appropriate State agency on September 1, 1969. The charge was filed with the Commission on October 28, 1969, within the time prescribed by Section 707 (b) and (d) of Title VII.

SUMMARY OF FACTS AND EVIDENCE

1. Charging Party was hired by Respondent employer on June 5, 1967, as a stores clerk and worked in that capacity until his discharge on April 2, 1969.

2. The collective bargaining agreement between Respondent employer and Respondent union, signed August 25, 1966, was in effect during the Charging Party's employment. Article VI, Section "b" provides:

> "The principle of seniority shall apply in the application of this Agreement in all reductions or increases of force, preference of shift assignment, vacation period selection, in bidding for vacancies or new jobs, and in all promotions, demotions, or transfers involving classifications covered by this Agreement."

3. Building #1 Stores and Building #2 Stores are separate seniority groupings. Employees compete within a seniority grouping for shift assignments.

4. Immediately prior to December 2, 1968, the Charging Party was assigned to Building #1 on the graveyard shift, with Saturdays and Sundays off. On that date he was transferred to Building #2 after being the successful bidder on an opening. He was assigned to the day shift, with Saturdays and Sundays off.

5. About September, 1968, the Charging Party affiliated with the Worldwide Church of God. Article 12 of the Fundamentals of Belief of this church state:

> "We believe that from Friday sunset to Saturday sunset, the seventh day of the week is the Sabbath of the Lord our God. On this day we must rest from our labors, following the commands and example of the Apostle Paul, the New Testament Church, and Jesus."
>
> (Hereafter, this belief is called Sabbath—Observance).

6. Respondent employer was aware of Charging Party's religious belief as early as October 11, 1968.

7. Prior to March, 1969, Charging Party's Sabbath—Observance required no accommodation from Respondent employer. His regular days off both prior to and subsequent to his transfer from Stores 1 to Stores 2 enabled him to meet his religious requirement of Sabbath—Observance.

8. In March, 1969, a less senior employee within the same seniority grouping and classification as Charging Party, went on vacation. Respondent employer and union followed the customary procedures in applying

the principle of seniority in making shift assignments, and the Charging Party was transferred to fill the slot of the man on vacation, which included two midweek days off.

9. Subsequently, on two consecutive Saturdays, March 8 and 15, Charging Party did not report for work, without having received permission to be absent.

10. On March 21, 1969, Respondent employer warned Charging Party he would be scheduled for a discharge hearing if he failed to report to work on March 22, 1969.

11. Evidence on record indicates that on March 21st, the Respondent employer was aware that the reason for the Charging Party's failure to report the two previous Saturdays was his religious tenets which required Sabbath—Observance. Evidence on record further indicates the Respondent employer was aware that the Charging Party had discussed this with his minister, and there was no provision that would allow him to deviate from the requirement.

12. Charging Party did not report for work on March 22, 1969. A discharge hearing was held on March 31, 1969, and Charging Party was found guilty of insubordination for refusal to work on Saturdays, and was discharged effective April 2, 1969.

13. Respondent employer asserts that to permit Saturday —Observance by the Charging Party would discriminate against its other employees who would have to work Saturdays in the place of Charging Party. Respondent employer further asserts that such unequal administration of the collective bargaining agreement would create chaotic personnel problems through a

multitude of grievances, and that this would be an undue hardship.

14. There is no evidence that Respondent employer has accommodated any other Sabbath—Observer at this situs, or has been requested to do so.

15. Respondent union asserts that if Respondent employer were to accommodate Charging Party in his Sabbath—Observance needs, "it would make seniority rights meaningless."

16. The Respondent union participated in the Step 2 discharge hearing.

17. It is undisputed that at the discharge hearing all parties were aware of Charging Party's needs as a Sabbath—Observer. The subject of the discharge hearing centered around the disciplinary action to be taken, and consideration of accommodating a Sabbath—Observer was not discussed by either Respondent company or Respondent union.

/s/ Charles E. Clark
Charles E. Clark, Field Director

April 15 '71
Date

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
911 Walnut Street—Room 500
Kansas City, Missouri 64106
April 3, 1972

In reply refer to:
TKCO 0061

Mr. Larry Hardison
8704 Wornall
Kansas City, Missouri

Dear Mr. Hardison:

The Equal Employment Opportunity Commission has investigated your charge of employment discrimination and has found reasonable cause to believe that your charge is true. A copy of the decision is enclosed.

The Commission will attempt to eliminate this practice by conciliation as provided in Title VII. Conciliation efforts will be undertaken by a member of the staff of this office. He will be in contact with you within the next thirty (30) days and you will kept informed of the progress of conciliation efforts.

Should you have any questions regarding this case please contact me at the above address.

Sincerely yours,

/s/ B. A. Villarreal
B. A. Villarreal
Kansas City District Director

BAV:jaw
Enclosure
cc: Michael D. Gordon, Attorney
Thomas J. Cox, Jr.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20506
Case No. YKC1-236

Larry G. Hardison
Charging Party

v.

Trans World Airlines, Inc.
Kansas City, Missouri

and

Local 1650 and District 142,
International Association of
Machinists and Aerospace Workers,
AFL-CIO
Kansas City, Missouri
Respondent

DECISION

The Commission has considered the Field Director's Findings of Fact issued April 15, 1971 and has examined the entire record. To the extent that exceptions and cross-exceptions filed by the parties raise material issues they are discussed herein. The Commission adopts the Findings of Fact insofar as it comports with this decision.

It is undisputed that Charging Party was discharged because of his refusal to work on Saturdays. Sabbath (Saturday) labor is contrary to the convictions and requirements of the religion of which he is an adherent—Worldwide Church of God.

Whether Charging Party attempted to secure the needed accommodation through contractual grievance procedures is disputed by the parties. It is not possible, on this record, to determine with reasonable certainty the steps taken by him to arrange an accommodation of his

religious tenets. In any case, it is now well settled that a Charging Party's failure to exhaust contractual grievance procedures is irrelevant to this Commission's jurisdiction under Title VII. *Hutchings* v. *U.S. Industries,* 428 F.2d 303 (5th Cir. 1970).

Charging Party's transfer may have been an error on his part inasmuch as it complicated his refusal to work Saturdays, however, he states that he assumed differences could be worked out. Of course, remedial action need not, in addition to accommodating Charging Party's religion, preclude concomitant inconvenience to make his accommodation possible.

Respondent Employer's contention that accommodating Charging Party would discriminate against other employees is without merit. Respondent Employer has not shown that "chaotic" personnel problems would result or that such accommodation would trigger a multitude of grievances as feared. All such grievances, which Respondent Employer speculates would result, could be defended on the basis of compliance with Title VII. Since the Union is a party to this action, we may presume that unmeritorious grievances will not be processed.

Respondents' refusal to authorize and accommodate absences for religious purposes had the foreseeable effect of requiring Charging Party either to abandon a fundamental precept of his religion or to forfeit his employment with Respondent Employer. There is no claim on employees of other religions. Thus, though on its face the policy appears to apply even-handedly, it had a harsher impact on Charging Party than on other employees solely because his religion is different from theirs.[1] Title VII requires

1. Cf., *Sherbert* v. *Verner,* 374 U.S. 398 (1963), where the Court held that a seemingly neutral State policy was unconstitutional when it placed a Seventh Day Adventist in a position similar to Charging Party's.

that Respondent consider the foreseeable effects of a superficially even-handed application of a particular policy. *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971). Where an employment policy has a disproportionate impact on members of a particular group, the employer has the burden of showing that the policy is so necessary to the operation of its business as to justify the policy's discriminatory effects, *Griggs, supra*; cf., *NLRB* v. *Great Dane Trailers, Inc.*, 388 U.S. 26, 33-34 (1967). See also, EEOC Guidelines on Religious Discrimination, 29 C.F.R. 1605.1.

In *Dewey* v. *Reynolds Metals Co.*, 429 F.2d 324 (6th Cir. 1970), aff'd per curiam by an equally divided court, 35 U.S.L.W. 3526 (U.S. June 1, 1971)[2] the court ordered dismissal of a complaint similar to Charging Party's because, inter alia, to grant plaintiff's request for special treatment would be to discriminate against other employees and could create personnel problems and lead to grievances and attendant arbitration.[3] It is the Commission's position that reasonable accommodation of the religious beliefs of particular employees does not discriminate against other employees whose religious beliefs do not require accommodation. We respectfully disagree with the decision in *Dewey* to the extent that it would require less than a showing by an employer that "chaotic personnel problems" will ensue if the religious needs of particular employees are accommodated.

---

2. Decision by an equally divided court, of course, creates no precedent. *Durant* v. *Essex Co.*, 7 Wall. 107, 110, 19 L.Ed. [sic] 154, 147 (1869); *United States* v. *Pink*, 315 U.S. 203 (1942); *Ohio ex rel. Eaton* v. *Price*, 364 U.S. 263, 264 (1960). Moreover, the per curiam affirmance provides no indication as to the basis for the Court's decision.

3. The result in *Dewey, supra*, was also based upon facts which are not present here.

There is reasonable cause to believe that Respondents have engaged in an unlawful employment practice in violation of Title VII of the Civil Rights Act of 1964, as alleged.

For the Commission
/s/ Eduardo Pena Jr.
Director of Compliance

Mar. 15, 1972
Date

APPENDIX D

The following selections are excerpts of the trial transcript that are cited in the petition and not made part of the appendix on appeal to the circuit court:

(1) Exhibit A to Hardison's Complaint—The EEOC charge filed by Hardison provides, in pertinent part, as follows:

> ". . . During the time between October '68 and March '69 I had transferred to a different shift (still in Stores), and in the engine overhaul building. During the month of February vacations were scheduled. The man with lowest seniority scheduled his vacation for March 3rd thru March 14th. . . ."

(2) The following testimony was elicited from Hardison by his counsel on page 81 of the trial transcript:

> Q. Then did you have any difficulty observing the Sabbath while you were in Building 2?
> A. Only until—I kept the Sabbath until the man of less seniority than I went on vacation.
> Q. All right, this would have meant that you would have worked on March 8 and March 15 to replace him, is that not correct?
> A. Yes.

(3) The following testimony was elicited from Hardison by counsel for the union on pages 73-74 of his deposition:

> Q. Who was the plaintiff in that action, you or your wife?
> A. My wife.
> Q. Did you contest the divorce?
> A. No, I allowed it.
>
> * * *

> Q. What were the allegations in the divorce?
> A. Nonsupport.
>
> * * *
>
> Q. Well, is there any church teachings on divorce?
> A. Well, just what the Bible says, that there is only one cause of divorce.
> Q. What is that?
> A. Well, Christ put it fornication, which is fraud.
> Q. Well, at the time your wife filed for divorce, you would have been baptized, is that correct?
> A. Yes, sir.

(4) The following testimony was elicited from Hardison by counsel for the unions on pages 195-197 of the trial transcript:

> Q. Have you been a member of the Minutemen?
> A. Yes.
> Q. Are you a member now?
> A. No.
> Q. When you were a member of the Minutemen, isn't it true that you used your employment to keep lists at the Gas Company, to keep lists of people who had guns and copying machines and things like that which you turned over to Robert DePugh and other people at the Minutemen?
> A. Well, I didn't work at the Gas Company. I did keep a log, but I didn't turn it over to anybody. I have since destroyed it.
> Q. Isn't it true that you have told your church that if you get any money out of this suit that you will share it with them?
>
> Mr. Pickett: Your Honor, I object to any reference whatsoever to any - - - -
>
> * * *

The Court: Well, I am going to sustain the objection. That is in the kitchen sink category, if I may say so.

(5) On pages 279, 280 and 474 of the trial transcript, Judge Oliver made the following observations:

". . . we can start on our way to the Supreme Court, because this Court is fully cognizant of the fact that the importance of the legal question presented is such that action taken by this Court and necessarily having to decide the question presented obviously will be appealed, first to the Court of Appeals and finally to the Supreme Court of the land, because I know of no case that presents the issue quite as sharply. . . .

* * *

". . . this is an ideal case to test the basic legal question presented and that they are on their way to the Court of Appeals and eventually to the Supreme Court of the United States, and I think it is a case where it is obvious that counsel have made the determination and have elected to put the effort and money into it, and they should be afforded every possible opportunity to accept the Court's invitation to introduce, maybe even the kitchen sink. . ."

* * *

"I enjoyed meeting all the witnesses. I wish you good luck, and I again make the observation that I was impressed with the men who were on the line handling the problem."